

1 IN THE CIRCUIT COURT OF OHIO COUNTY

2 WHEELING, WEST VIRGINIA

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4 IN RE:

5 TOBACCO LITIGATION CASE NO. 00-C-6000
6 MEDICAL MONITORING CASES

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10 JURY TRIAL

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12 Whereupon the above-entitled matter came on for
13 hearing before the Honorable Arthur M. Recht and Tod
14 J. Kaufman, at the Ohio County Courthouse, Wheeling,
15 West Virginia, and the proceedings are as follows.

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19 * * *

20 VOLUME 6-B

21 January 10, 2001

22 1:00 p.m.

23 * * *

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1 * * *
2 P R O C E E D I N G S
3 * * *

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4 (Whereupon, the following proceedings
5 were held in open court without a jury present:)
6 JUDGE RECHT: Mr. Furr?
7 MR. FURR: Good afternoon, Your Honor.
8 I asked to see the Court briefly before the jury came
9 in because I felt there was something I should raise.

10 I know we are about to have an
11 interesting afternoon, trying to take the evidence of
12 Doctor Henningfield under the approach the Court has
13 outlined, and I just wanted to raise something to the
14 Court.

15 I learned at lunch that there have
16 already been two instances we believe in which the
17 term nicotine has inadvertently been put before the
18 jury. I believe it was completely inadvertent on both
19 occasions.

20 First, I believe Mr. Hulsey had it on
21 his chart of smoke constituents that he showed in his
22 opening. He said nothing about it, and I'm claiming
23 actually no prejudice with him having done that. I'm
24 confident if it was done, which I was told at lunch it
25 was, inadvertently. We don't have a complaint about

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1 that.

2 I'm also told that this morning
3 Doctor Mr. Newbold's opening, he inadvertently put the
4 term nicotine on a board that was shown to the jury.
5 He also said nothing about nicotine. The board was up
6 very briefly, I am told, and I don't believe there was
7 any prejudice to either party by it.

8 But I felt I should alert the Court that
9 that appears already to have happened. I don't think
10 it changes where we are. I don't think there has been
11 any opening of the door. I certainly don't claim any
12 by Mr. Hulsey, and I don't think we have done it
13 either, but I felt my obligation to the Court required
14 me to tell the Court certainly that we had done it and
15 I tried to put it in context of where I think we are
16 right now.

17 JUDGE RECHT: Thank you very much.

18 MS. DURAND: Your Honor, one other
19 matter, and just to put the matter at rest with
20 respect to the chart. That chart will be used with
21 Doctor Henningfield, but nicotine has been removed
22 from the chart.

23 JUDGE RECHT: Right. All right. Any
24 other mea culpas?

25 MS. DURAND: Just one final matter, Your
1596

2 Honor. We would ask the Court's permission during
3 Doctor Henningfield's testimony, we have a little
4 object that is used frequently in schools to
5 demonstrate the effect of cigarette smoking. And we
6 certainly don't want to destroy the environment of the
7 Court; that's not going to be a problem, I don't
8 think. We -- all we need to do is put the little
9 doll-like thing together, light a cigarette for two
puffs of smoke, and then put it out.

10 And what it does is it goes into a vial,
11 if I could demonstrate here, and this assists -- will
12 assist Doctor Henningfield in demonstrating what
13 constituents are in smoke. It's a little vial as you
14 can see here. We would put it together and do only

15 two puffs and immediately put the cigarette out.
16 I don't think it would really harm the
17 air in this courtroom. And we would only ask the
18 Court's permission to do that.

19 JUDGE RECHT: I mean, as far as any
20 problem associated with the air in the courtroom,
21 don't worry about that. But is there any other --

22 MR. FURR: Your Honor, at one level
23 these defendants have no objection to the burning of
24 cigarettes.

25 JUDGE RECHT: You would have

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1 disappointed me if you had asserted that.

2 MR. HULSEY: We want this on the record,
3 Your Honor.

4 MR. FURR: On the other hand, I think we
5 would agree the apparatus has a very youthful
6 appearance to it. I guess the tradeoff -- I'm not
7 going to make a formal objection about it, but I think
8 that if they are going to use this youthful-appearing
9 apparatus, that they should explain to the jury that
10 this is a technique for explaining to school
11 children --

12 MR. SEGAL: That's agreed.

13 MR. HULSEY: Absolutely.

14 MR. FURR: -- what happens when you burn
15 cigarettes.

16 MR. HULSEY: Absolutely. You are
17 exactly right.

18 JUDGE RECHT: All right. Now, what
19 confused me was that you said before the jury comes
20 out, I thought we were going to have him come on now
21 anyhow before the jury came out. Has that changed?

22 MS. DURAND: That's correct, Your
23 Honor. That's my mistake.

24 JUDGE RECHT: While the jury is still
25 out and before we get -- I mean, we really need these

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1 microphones to be working primarily because of the
2 court reporters. Is your working? Because we had
3 some problems, and I'm told that the public address
4 system has been fixed.

5 MS. DURAND: Is that working now?

6 JUDGE RECHT: Are you on?

7 MS. DURAND: I'm turned on.

8 JUDGE RECHT: Okay. Well, I guess we
9 are working then. We will see.

10 All right. Let's bring in the first
11 witness.

12 MS. DURAND: Your Honor, the plaintiffs
13 will call Doctor Jack Henningfield.

14 JUDGE RECHT: All right. Just kind of
15 stand there, sir, and the young lady will administer
16 the oath to you, but you don't have to go through this
17 maze to get there. So just raise your right hand,
18 please.

19 (The witness is duly sworn.)

20 JUDGE RECHT: Sir, just have a seat
21 here.

22 THE WITNESS: Thank you.

23 JUDGE RECHT: That's fine. And can you
24 just talk into that microphone and make sure it --

25 THE WITNESS: Sure. Is this working?

1 JUDGE RECHT: It sounds all right so
2 far. Thank you.

3

4 * * *

5 JACK EDWARD HENNINGFIELD, Ph.D.
6 a witness herein, called on behalf of
7 the plaintiffs, being first duly sworn, was examined
8 and testified as follows:

9 * * *

10 VOIR DIRE EXAMINATION

11 BY MS. DURAND:

12 Q. Good afternoon, Doctor Henningfield. I would
13 explain to you just that we are going to go ahead and
14 begin here outside the presence of the jury with your
15 qualifications.

16 Could you please state your name for the
17 record?

18 A. Jack Edward Henningfield.

19 Q. And Doctor, can you please tell me where you
20 are currently employed?

21 A. The Pinney Associates, which is a health
22 consulting group in Bethesda, and I'm a part-time
23 faculty at Johns Hopkins University School of
24 Medicine.

25 I also do other consulting for other

1600

1 organizations. Those are my two primary places that I
2 work.

3 Q. And could you tell me, Doctor, what your
4 position is at Pinney Associates?

5 A. At Pinney Associates, my title is vice
6 president for research and health policy.

7 Q. What does that entitle?

8 A. I do consulting on a wide range of issues
9 relating to medicine, development, a wide range of
10 medicines ranging from those that may be used to treat
11 epilepsy, analgesics and other areas of medicine.

12 Q. And Doctor, what is your position at Johns
13 Hopkins?

14 A. Associate professor of behavioral biology in
15 the department of psychiatry.

16 Q. And could you elaborate as to what that
17 entails?

18 A. I've been at Johns Hopkins for 22 years now.
19 I do collaborative research with my colleagues. I do
20 some teaching in the medical school and some teaching
21 in the school of public health at Johns Hopkins.

22 Q. And what is the field in which you specialize
23 with respect to your teaching at Johns Hopkins?

24 A. Pharmacology, behavioral pharmacology,
25 toxicology. One of my positions that I don't

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1 currently hold was a -- I think it was an associate or
2 adjunct professor of toxicology at the University of
3 Maryland.

4 Q. Okay. And specifically to expedite this
5 process, could you please highlight for me those areas
6 of your qualifications that give you particular
7 expertise in the area of cigarette design and
8 manufacturing?

9 A. Sure. I was actually hired as a junior
10 faculty member as an instructor at Johns Hopkins in

11 1978, and the purpose of the research was to
12 investigate the different factors that affect
13 cigarette smoking, and major tools that we used were
14 things that are related to the design of cigarettes.

15 So, for example, yesterday I believe it was
16 Mr. Furr referred to the National Cancer Institute
17 Working Group, they developed a series of cigarettes
18 that had various design features. We used those
19 cigarettes in our research.

20 The University of Kentucky Tobacco Research
21 Institute similarly has a wide range of cigarettes
22 with different designs. We obtained those cigarettes
23 and used them.

24 We use ventilated holders to look at the
25 effects of ventilation. We cut cigarettes up into

1602

1 pieces and had people smoke in different ways.

2 Again, to go back to some of Mr. Furr's
3 comments yesterday talking about selective changes in
4 cigarettes versus general changes, the tools that we
5 have were looking at the effects of selective changes
6 in cigarettes, the effects of general changes like
7 changing the number of cigarettes people smoke.

8 But if you look at the publication record, a
9 lot of it is related to cigarette design-related
10 issues.

11 Q. So would it be fair to say, Doctor, that you
12 have done a considerable amount of research and have
13 had a considerable amount of experience precisely in
14 the field of cigarette design and engineering?

15 A. I have done my own research, I have
16 collaborated with others at the Centers for Disease
17 Control, and I currently consult in that area for a
18 variety of organizations.

19 Q. Have you also published in that field?

20 A. Yes, I have.

21 Q. And can you elaborate for me to a small
22 extent as to the types of things that you have either
23 published or presented with respect to cigarette
24 design and engineering?

25 A. Yes. I'm pausing because I published more

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1 than 285 research papers. A number of them are
2 related to dosing characteristics of the cigarettes.

3 Some of them, some of the earliest ones were
4 related to patterns of cigarette smoking back in
5 1979. We looked at ventilated holders, and that was
6 published in '79 or '80.

7 We looked at different national -- the
8 National Cancer Institute Working Group on Cigarettes
9 in '79, '80, and that paper was published in the early
10 1980s.

11 I don't know how many papers precisely, but
12 over the years we have been involved in a number of
13 studies related to design.

14 Q. And do you sit on any committees or boards or
15 are you involved in any public health activities that
16 focus on cigarette design and engineering?

17 A. Yes.

18 Q. Could you explain those to me?

19 A. Back in the mid1980s, I was working with
20 other investigators at the Centers for Disease Control
21 Office on Smoking and Health where we were looking

22 with the tools that we had at cigarette design
23 features, and a particular area of focus was the
24 ventilation techniques that again -- I think this was
25 mentioned yesterday; I was here for a part of the

1604

1 day.

2 The ventilation was a major cigarette design
3 change that was rapidly being implemented in the late
4 '70s, early '80s in particular.

5 Another thing that was mentioned yesterday
6 was the Canadian Health Canada's expert panel on
7 cigarette modification. That was mentioned
8 yesterday. It was mentioned as something the tobacco
9 industry has collaborated in. I have also been
10 invited as an expert. There were only a couple of
11 Americans invited to that process. They held two
12 major meetings, and I was one of the United States'
13 couple invited experts for both of those meetings and
14 continue to be involved in the process.

15 The State of Massachusetts has been involved
16 in efforts. I have been an adviser to them.

17 The World Health Organization has been
18 interested in cigarette design, and I have served in
19 several of their international meetings on cigarette
20 design. I was asked to be the primary author of the
21 World Health Organization discussion document on
22 cigarette design issues, and I'm one of only -- I
23 think there is one other -- I believe only one other
24 American who serves on the World Health Organization
25 Scientific Advisory Committee on Tobacco Products.

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1 Q. Given this extensive experience in the field
2 of cigarette design and engineering, have you had an
3 opportunity to specifically study and research the
4 ingredients in cigarettes?

5 A. Yes, in the range of the tools that we have
6 had.

7 So for example, our studies have looked at
8 relatively crude ingredient differences using -- and
9 by tools, I mean cigarettes such as those provided by
10 the -- the old National Cancer Institute Working Group
11 and the University of Kentucky Tobacco and Health
12 Research Institute. And then using where it's studied
13 more broadly than my own laboratory studies, you know,
14 of course, this has been something that I have worked
15 on with colleagues to try to understand what
16 ingredients, what design changes are important in
17 cigarettes that control cigarette smoking behavior.

18 Q. Now, the ingredients in cigarettes that you
19 have familiarity and expertise with, that would
20 include not -- would that include the ingredients that
21 are inherent to tobacco itself?

22 A. Yes.

23 Q. And would it include anything else?

24 A. Our personal studies, my personal studies
25 have been with tobacco cigarettes and using

1606

1 pharmacological techniques, modifying smoking behavior
2 to see which techniques made a difference.

3 In terms of other specific ingredients, I
4 haven't done bench laboratory work. I have studied it
5 through the literature with colleagues.

6 I served on working groups, again, such as

7 the Health Canada working group. That's been an area
8 of research that frankly was slow in the past and
9 hopefully it will move more quickly now that we are
10 getting a better picture of what all the ingredients
11 are in cigarettes.

12 Q. But in addition to just the main ingredients
13 in tobacco, you have expertise, I take it, in the
14 flavorants or the additives that are put in tobacco
15 during the design and engineering of the cigarette?

16 A. Flavorants and other things that affect smoke
17 quality are something that myself and others in the
18 field are really interested in, because those are
19 factors that heavily influence cigarette smoking.

20 Q. And Doctor, with respect to smoke, have you
21 also had an opportunity to participate in or get
22 experience in research that deals with the
23 constituents of cigarette smoke?

24 A. Smoke is the end product of all of this, and
25 we have done a variety of studies ranging from

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1 changing the concentration of the smoke that goes into
2 the mouth, looking at smoke that is taken in from the
3 end of the cigarette versus the smoke which is taken
4 in from the end nearest to your mouth by cutting the
5 cigarettes, and part of the idea is that the smoke
6 chemistry changes as you smoke the cigarette.

7 So, part of those studies were just to look
8 at how differences in general smoke chemistry might
9 affect smoking.

10 Q. Now, we have talked about the ingredients in
11 tobacco and any flavorants or additives as well as the
12 smoke. What about any other portion of a cigarette
13 such as a filter or the paper? Do you have experience
14 or have you researched that aspect of the cigarette's
15 design?

16 A. The major area that we have looked at
17 directly are the ventilation techniques, and part of
18 the reason is that's been a major cigarette design
19 change that has emerged over the last few decades,
20 particularly since the early 1970s, and it's been
21 something that I have been involved -- one of my first
22 studies was our own ventilation technique which was
23 ventilated cigarette holders, to use that technique.

24 The cigarettes with different ventilation
25 characteristics, my colleagues that -- I was involved

1608

1 in some of the studies, I didn't co-publish some of
2 the studies in which the holes were taped over, but I
3 was involved in the design of those studies.

4 Q. And Doctor, what about any research you may
5 have done or participated in with respect to filters?

6 A. When I mention ventilation, the primary
7 target area of ventilation is the filter.

8 Q. Well, in addition to the filters?

9 A. I guess I'm not sure what you mean.

10 Q. Well, okay. The ventilation in general, can
11 you specify more about the filters?

12 A. The main area that I have been interested in
13 is the ventilation technique of the filter. There are
14 different filters as I'm going to demonstrate a little
15 bit later, different filter designs. I have
16 personally studied the impact of different filter
17 designs. I have been involved in working groups that

18 has considered them.

19 Q. So in addition to just the pure ventilation,
20 you have experience in the various types of filters
21 that are out there in the market?

22 A. Yes. And here most of the filters that are
23 in the market are the cellulose acetate filters.
24 There are a small percentage of the market that has
25 charcoal additives.

1609

1 Q. And Doctor, with respect to an ingredient
2 such as tar in cigarettes, can you tell me a little
3 bit about your background and expertise in that area?

4 A. Sure. Tar is one of the things that we were
5 interested in in our early studies, how it affected
6 cigarette smoking, and the tool that we were using
7 were the cigarettes, the research cigarettes that you
8 could get, the variant tar levels and variant variety
9 of constituents, and we would have panel of smokers
10 smoke them.

11 Most of the studies that were completed I
12 believe have been published when we were first using
13 the cigarettes. We purchased a pretty wide range of
14 the cigarettes to start investigating how different
15 cigarettes with different tar characteristics,
16 different carbon monoxide characteristics and so forth
17 were smoked.

18 Q. Was this a similar type of inquiry as what
19 was done by the FTC with respect to tar?

20 A. No, the Federal Trade Commission wasn't
21 investigating these issues.

22 Q. Okay. Can you -- because of your experience,
23 are you qualified to speak to the levels that have
24 been measured by the FTC with respect to tar?

25 A. Oh, yes.

1610

1 Q. Okay. Now, is there anything else about your
2 background and your experience and qualifications
3 which gives you this unique ability to speak to issues
4 of cigarette design, engineering and manufacturing
5 that you can elaborate on for the Court?

6 A. My general training and my current area of
7 consulting is on medications design and development.
8 And in medications design and development, you are
9 concerned with making sure that the dosages of the
10 substances are controlled, that they are designed in
11 ways that people get the doses that you tell them that
12 they are going to get, and that they are designed in
13 ways that facilitate getting the right doses.

14 Again, going back to some of the discussion
15 yesterday on selective reductions and general
16 reductions of things in cigarette smoke, this general
17 principle is important in medicines designed in
18 general where the goal is to make sure that people,
19 for example -- cough medicine, that they get the right
20 dose of the active ingredient in cough medicine, that
21 they don't use it incorrectly, that they don't get too
22 much, and this is highly relevant in the tobacco
23 area. One of my tobacco publications concerns the
24 design and labeling of cigarettes.

25 Q. So Doctor, in addition to your specific

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1 dealings with cigarettes and cigarette design issues,
2 your other medical -- your other training and

3 experience with respect to these pharmacology issues
4 makes you especially qualified to speak to things like
5 the general reduction and selective reduction that
6 were discussed during opening by the defendants
7 yesterday?

8 A. Sure. And it's not just what people would
9 consider pharmacological. For example, the Food and
10 Drug Administration developed Food Labeling Principles
11 and the Food Labeling Rules, it's called, which is a
12 several hundred page, looks like a small telephone
13 book, was something that I studied -- that I discussed
14 with people at the Food and Drug Administration and
15 that was something that provided a model for our
16 proposals concerning cigarette labeling, because some
17 of the issues are similar: What is the serving size,
18 how much are people using, what do you tell them, how
19 do you label it and so forth.

20 Q. Thank you, Doctor.

21 Now, I think that now that we have gone
22 through your qualifications with respect to the very
23 narrow issues regarding cigarette design and
24 engineering, I would like to return to some of your
25 more general background issues.

1612

1 For example, where did you obtain your
2 undergraduate degree, Doctor?

3 A. The University of Minnesota College of
4 Liberal Arts.

5 Q. And what was that degree in?

6 A. My primary degree was psychology and my
7 general focus was biology.

8 Q. And when did you graduate with that degree?

9 A. In 1974.

10 Q. And did you graduate with honors?

11 A. Yes.

12 Q. And can you explain where you went to
13 graduate school?

14 THE WITNESS: Well, I went to graduate
15 school at the University of Minnesota in part, because
16 as an undergraduate I was employed in a laboratory
17 that was studying drugs in animals, and the University
18 of Minnesota graduate school happened to become the
19 lead institution in the United States with what was
20 called the psychopharmacology training program, and
21 that was basically drugs that affect the brain and
22 behavior. And I was given a United States public
23 health service fellowship to go to that program.

24 Q. And did you receive a Master's degree through
25 that program?

1613

1 A. No, I went directly to a Ph.D. degree.

2 Q. And can you tell me when you received that
3 Ph.D.?

4 A. In the spring of 1977.

5 Q. Did you hold any fellowships after you
6 received your Ph.D.?

7 A. Yes. I was awarded a National Council on
8 Alcoholism fellowship that was done at the University
9 of Minnesota, postdoctoral fellowship, and then the
10 Johns Hopkins program was I described earlier a junior
11 faculty position. It was the beginning of their
12 fellowship program, so it's generally regarded as --
13 it was postgraduate training for all practical

14 purposes for two years and then the National Institute
15 on Drug Abuse, which is parts of the National
16 Institutes of Health at present, awarded me an
17 additional fellowship.

18 Q. And where was your first teaching position?
19 That was at Johns Hopkins?

20 A. My first, excuse me?

21 Q. Teaching position?

22 A. Yes.

23 Q. Now, can you just list for the Court here,
24 please, some of the awards and honors you received --

25 JUDGE RECHT: Is this part of the CV?

1614

1 MS. DURAND: Yes, Your Honor.

2 JUDGE RECHT: If we have that, that's
3 fine. And I don't want to deny you the right to do it
4 before the jury, but for this purpose right now, I
5 really don't think we need to go through that.

6 What is this witness being offered for?

7 If we were to say that he's qualified as an expert, to
8 be able to give opinions and conclusions within what
9 discipline?

10 MS. DURAND: Your Honor, this expert
11 will be offered in the area of -- well, to testify in
12 the area of cigarette design, engineering, and as an
13 expert in the ingredients and constituents of
14 cigarettes, in the -- and by design and engineering of
15 cigarettes, I'm including with that the manner in
16 which, as he stated before, the filtration and
17 ventilation takes place, the constituents --

18 JUDGE RECHT: Well, that would come
19 under the manufacturing. I think you have really kind
20 of the trilogy of design, engineering and
21 manufacturing. Is that kind of in a broad sense of
22 what he is being offered for?

23 MS. DURAND: Yes, Your Honor. And to
24 put it even more simply, what is a cigarette, what is
25 it made of?

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1 Of course, there is going to be a little
2 bit of background information as to the way that
3 cigarettes -- the manufacturing and development of
4 cigarettes over time. You know, clearly in 1800 they
5 were made differently than -- okay.

6 JUDGE RECHT: That's fine. I mean, if
7 you have his CV and we have other areas, that's fine.
8 I don't think we need to get -- I want to get this
9 jury out here as quickly as we possibly can.

10 But I yet want to still give an
11 opportunity to have -- because there is some areas
12 that we have got to be careful of.

13 MS. DURAND: Which is why I avoided
14 using just the CV, Your Honor, because everything is
15 on there, no matter what words are there.

16 JUDGE RECHT: I know. But let's let
17 Mr. Furr, if that's who is going to handle it, take
18 the voir dire at this time so I can at least be able
19 to determine problem areas there are, if any. I see
20 one, but I think it can be addressed.

21 All right. Mr. Furr?

22 MR. FURR: Thank you, Your Honor.

23 JUDGE RECHT: If you have the CV, we
24 wouldn't mind seeing it, unless there is -- is there

25 something secretive about it?

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1 MR. HULSEY: There are some bad words on
2 it.
3 MS. DURAND: It has the "A" and the "N"
4 word on it.
5 JUDGE RECHT: We are over 60, we can --
6 or I am.

7 All right. Go ahead, Mr. Furr.

8 MR. FURR: Thank you, Your Honor
9 * * *

10 VOIR DIRE EXAMINATION

11 BY MR. FURR:

12 Q. Good afternoon, Doctor Henningfield.

13 A. Good afternoon.

14 Q. My name is Jeff Furr, and you and I have had
15 the pleasure of each other's company before, haven't
16 we, sir?

17 A. That's one way of putting it.

18 Q. Doctor Henningfield, isn't it correct, sir,
19 that you have no training in the design, construction
20 and manufacture of cigarettes?

21 A. It depends what you mean by training. I have
22 the equivalent of postgraduate training with some of
23 the most knowledgeable people in the United States
24 including working with Dietrich Hoffman and people in
25 the Office of Smoking and Health.

1617

1 MR. FURR: Your Honor, in the interest of
2 moving this, if Alecia Moore could help me access
3 materials that I might want to show the Doctor?

4 JUDGE RECHT: Sure.

5 MR. FURR: Alecia, could I have the small
6 deposition from 11-17-97?

7 MR. KNOPF: If the Judge doesn't have
8 any problem, she can use this chair, she can sit down.

9 MR. FURR: I'm afraid she will fall
10 asleep if she sits down.

11 MR. KNOPF: I thought it might be more
12 accessible and speed things up a bit.

13 MR. FURR: May I approach the witness,
14 Your Honor?

15 JUDGE RECHT: Yes.

16 BY MR. FURR:

17 Q. Doctor Henningfield, since there is no jury
18 here I will be informal. Do you recall being deposed
19 in a case, a Small case pending in the State of New
20 York, don't you, sir?

21 A. Yes.

22 Q. Let me hand you your deposition from November
23 17th, 1997, and we will look at page 51, line 21.

24 Sir, you were asked the following question:
25 Have you had any training in the design, construction

1618

1 or manufacture of cigarettes?

2 And your answer, sir, was: No, I haven't.

3 Is that correct?

4 A. That's correct.

5 Q. Sir, I'm just asking what your answer was to
6 this question now?

7 A. Sure.

8 Q. I'm going to come back to this, I promise
9 you.

10 A. Thank you.

11 Q. Your answer was no, you have not had any
12 training in the design, construction or manufacture of
13 cigarettes. Is that correct, sir?

14 A. That was my specific answer to a rather
15 narrowly-worded question.

16 MS. DURAND: Your Honor, if I could ask
17 the witness be given an opportunity to read what he
18 stated in his deposition from 1997 or any other
19 deposition that Mr. Furr would like to show to him
20 before he is asked a question about it?

21 JUDGE RECHT: All right. The jury is
22 not here. If the jury is here I would permit that.
23 Let's get on with it. I want to see where we are.

24 Your objection would be well taken if we
25 were before a jury.

1619

1 BY MR. FURR:

2 Q. Sir, you would agree that the field of
3 cigarette design includes things that are far outside
4 your area of expertise, wouldn't you, sir?

5 A. Yes.

6 Q. In fact, your area of expertise with respect
7 to cigarette design are design attributes of
8 cigarettes that affect the addictive properties of
9 cigarettes; is that correct, sir?

10 A. It's broader than that.

11 MR. FURR: May I approach again, Your
12 Honor?

13 JUDGE RECHT: Yes.

14 BY MR. FURR:

15 Q. Let me show you your deposition, Doctor, the
16 same deposition, the previous question and answer that
17 you wanted to look at, Doctor.

18 Am I correct that you were asked the
19 following question: Will you be testifying in this
20 case as an expert on cigarette design?

21 And your answer was: On -- now, cigarette
22 design is an incredibly broad category. It includes
23 things that are far outside of my expertise. So, for
24 example, to include a lot of aspects of paper
25 manufacture, that would be far outside of my expertise

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1 and knowledge. On the other hand, there are aspects
2 of paper that are highly relevant to the addiction
3 issue, such as the ventilation holes in the paper. So
4 there are -- or chemicals that have been added to the
5 paper to keep the cigarette burning or to control the
6 burn rate.

7 There are things where there are areas of
8 paper manufacture and cigarette additives to paper
9 that are outside the scope of my expertise. But there
10 are certain aspects of how those chemicals are used,
11 how the paper is ventilated that are highly relevant
12 to the nicotine dependence issue and the concept that
13 cigarettes are highly engineered devices.

14 Is that correct, sir? Was that your answer?

15 A. Yes. And the last part of that is in part
16 the broadening and the concept that cigarettes are
17 highly engineered devices. So addiction is obviously
18 part of that.

19 Q. Yes, sir. The fact is, sir, that the issues
20 of cigarette design that you have investigated in the

21 past and have expertise on are related to addiction
22 and/or nicotine dependence. Is that correct?
23 A. Addiction is a major area of my expertise.
24 In order to study that, it's been essential to
25 understand the design and manufacture -- many aspects

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1 of the design and manufacture of cigarettes.

2 And in that process, I have emerged as one of
3 the leading experts in the United States and am relied
4 upon by the Centers of Disease Control, by the Food
5 and Drug Administration and now by the World Health
6 Organization to serve on those committees.

7 Q. On design aspects of cigarettes related to
8 nicotine and addiction/dependence?

9 A. You keep narrowing it. Those committees,
10 that is not their primary charge.

11 Q. But that is your charge on those committees,
12 isn't it, sir?

13 A. My charge is the design aspects of the design
14 and engineering of cigarettes that are relevant to
15 cigarette smoking behavior.

16 Q. And by cigarette smoking behavior, you mean
17 how people smoke cigarettes and why they keep smoking
18 cigarettes, don't you, sir?

19 A. And what they get when they smoke cigarettes
20 and how should cigarettes be tested and labeled by the
21 Federal Trade Commission method, whether that method
22 is appropriate or not.

23 Q. Sir, part of what you are talking about is
24 why people keep smoking cigarettes, isn't it?

25 A. Of course that's what I am talking about.

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1 Q. And why do people keep smoking cigarettes,
2 sir? Because of addiction?

3 A. Addiction is definitely part of that, and
4 that's definitely on the record. It's part of what I
5 study and investigate.

6 Q. Sir, you were retained in this case primarily
7 as an addiction expert, weren't you?

8 A. Addiction is a major part of my training and
9 what I do. The aspects of cigarette design that are
10 related to that and related to how cigarettes are
11 labeled is part of that.

12 It so happens that in the course of those
13 studies, as I mentioned, I have become one of the
14 nation's experts on cigarette design and labeling and
15 testing.

16 Q. Sir, my question was in this case, you were
17 retained primarily as an expert on addiction. Is that
18 correct, sir?

19 A. You know, the areas that the plaintiffs'
20 attorneys described were relevant to my background, to
21 what I have been involved in, to my current consulting
22 activities. I guess you would have to ask them which
23 were the most important things.

24 I mean, if you look at my curriculum vitae,
25 you will see that I published in a wide area of drugs,

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1 on a wide area of topics. Some of them concern
2 labeling and dosing.

3 I was involved in the Federal Trade
4 Commission method as an expert in that process, and
5 that's highly relevant to some of your discussion

6 yesterday about selective and general reduction. I
7 don't think you were talking about addition, but my
8 area of expertise is relevant to what you were talking
9 about.

10 Q. Sir, I can't ask the plaintiffs' attorneys.

11 JUDGE RECHT: The point is this. I want
12 to give you as much latitude within a certain area
13 while the jury is out.

14 The reason why this particular expert
15 was retained is not necessarily dispositive of the
16 issue as to whether or not under Rule 702 he can
17 qualify as an expert within the proffer. I understand
18 that that may be somewhat relevant.

19 The whole question at this point is even
20 though obviously, which is really what started all
21 this, this gentleman has an emphasis possibly in terms
22 of his background, training and experience in areas of
23 nicotine dependence and addiction, which are not in
24 this case as such because it is a class action and
25 addiction is an individual issue rather than having

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1 commonality of the class, so that there is no
2 misunderstanding of that -- we are not suggesting that
3 addiction and nicotine dependence is not a relevant
4 inquiry. It's not a relevant inquiry in this
5 particular case within the structure that it's
6 currently in.

7 Now, the question is whether or not
8 within his overall background, training and
9 experience, even though he has a particular emphasis
10 in addiction and dependency, does that mean he is not
11 also qualified in terms of offering opinions and
12 conclusions within the areas of -- and I'm still a
13 little confused now I hear design, labeling and
14 testing, before I heard engineering -- design,
15 engineering and manufacturing. But I think within at
16 least some of those categories, the question now is
17 does he still possess -- even though he has a
18 particular emphasis in one area is not preemptive in
19 regard to the other areas.

20 And that's what I'm looking for as of
21 right now and I'll allow you to get all of your
22 addiction out of your system when the jury isn't here,
23 and then we will make a decision as to whether or not
24 he is qualified with a specific understanding that he
25 is not to offer any opinions or conclusions within

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1 areas of nicotine, nicotine dependence, addiction -- I
2 don't know what other word you want to use.

3 Are there other euphemisms for this we
4 are not even talking about?

5 THE WITNESS: Habit.

6 JUDGE RECHT: Habit, yeah, that's a good
7 one too. Habit.

8 Also while we are on that, something
9 that bothered me a little bit is dosage control, drugs
10 that affect brain and behavior, those are all -- we
11 have got to be careful in terms of these I call them
12 euphemisms. Nonetheless we have to be careful.

13 And that's the reason we have the jury
14 out, so that this witness at least knows some of our
15 concerns. He may think this is a silly way of doing
16 things, and I would understand that, but we are doing

17 it for a reason.

18 And now we have to understand is there
19 enough under 702 to permit him to offer opinions and
20 conclusions within those areas. So if you want to
21 kind of wrap it up in those areas now, I would
22 appreciate it.

23 MR. FURR: I'm trying to do that, Your
24 Honor. I think I'm going -- I'm at the general level
25 now and am about to go specifically to the expertise

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1 that was brought out by Ms. Durand in just one moment
2 as soon as I get past this.

3 JUDGE RECHT: All right.

4 BY MR. FURR:

5 Q. Doctor Henningfield, let me ask you of the
6 deposition that I took of you in this case on October
7 18th, 2000, page 401, sir, I asked you the following
8 question: Do you believe that the plaintiffs should
9 win this lawsuit?

10 And your answer was: I guess that would
11 depend on the overall merits of the case, and frankly
12 my focus is on addiction. I am frankly not familiar
13 with all aspects of the case and have not attempted to
14 make myself familiar with it.

15 Is that your question and answer, sir?

16 A. That was my question and answer. And again,
17 you didn't ask me about other --

18 Q. I am asking you about this one now. I will
19 get to the others.

20 THE WITNESS: Should he interrupt me
21 when I'm talking, Your Honor?

22 JUDGE RECHT: He shouldn't, and it goes
23 both ways.

24 What Mr. Furr is attempting to do is
25 just to kind of make sure that your answers are

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1 responsive to the question. And so he's not trying to
2 be a bully. We will protect you, don't worry.

3 MR. FURR: He knows me better than that,
4 Your Honor.

5 THE WITNESS: I like the rules here
6 better than the deposition.

7 MR. FURR: Well, let's look at your next
8 deposition question and answer.

9 BY MR. FURR:

10 Q. You were asked: Do you believe that the
11 cigarette manufacturers should be forced to pay for
12 the medical monitoring of the plaintiffs in this
13 case?

14 And your answer was: You know, I'm serving
15 in this case as an expert primarily on addictive
16 aspects of nicotine and tobacco, and design features
17 that contribute to tobacco use.

18 Were those -- was that a question you were
19 asked and your answer, sir?

20 A. Yes. And addiction and design features were
21 in the same answer I point out.

22 Q. Okay. Sir, you spoke several times under
23 questions by Ms. Durand about ventilation holes. Do
24 you recall that?

25 A. Yes.

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1 Q. Why the interest in ventilation holes, sir?

2 A. One of the first areas of study that I was
3 involved in was ventilating cigarettes to see how it
4 affected cigarette smoking behavior. One of the
5 issues that was raised in the early 1980s when I was
6 active in this area, particular area of research was
7 the ventilation techniques with cigarettes and the
8 degree to which blocking those vent holes invalidated
9 testing, such as issues by the Federal Trade
10 Commission.

11 And so ventilation and this design feature
12 was highly relevant not just from the perspective of
13 addiction, but from the perspective of the level of
14 toxin exposure people got and whether or not the
15 numbers that were included in advertisements were
16 meaningful. All those areas go beyond addiction.

17 Is addiction related? Of course, addiction
18 is related, but it's much broader than that.

19 Q. All right, sir. Let's break that down. You
20 have conducted studies on the manner in which smokers
21 block the ventilation holes when they smoke
22 cigarettes; correct?

23 A. My direct studies first were with ventilated
24 holders, and that led to a series of studies on
25 altering how people were allowed to hold cigarettes,

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1 literally cutting the cigarettes up.

2 My colleagues at Johns Hopkins -- and I was
3 involved in this research group but did not co-author
4 the studies -- colleagues that followed me in this
5 program, James Zachny and others, use techniques that
6 in retrospect are considered rather crude but they
7 were useful, and that included literally taping the
8 ventilation holes, measuring puff volume, playing it
9 back and seeing what kind of smoke deliveries you got,
10 the effects of carbon monoxide intake. Those studies
11 were in the addiction studies per se.

12 Q. Why, why do people block the ventilation
13 holes when they smoke?

14 A. Well, there are many reasons. One of the
15 problems is that they don't see them, so I believe a
16 lot of the ventilation hole blocking is inadvertent.
17 I believe that the process of compensation where
18 people are trying to get more smoke in their bodies is
19 highly relevant.

20 Q. Okay. Let's talk about compensation. By
21 compensation, sir, you mean that when a smoker
22 switches brands of cigarettes, that sometimes they
23 will change their smoking behavior in order to
24 maintain the level of nicotine that they were getting
25 from the cigarette that they previously smoked, don't

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1 you?

2 A. Nicotine is one factor, but as my own
3 research shows, it's more than nicotine. There is
4 smoke compensation. Some of my findings are
5 consistent with tobacco industry findings that it is
6 more than nicotine, but nicotine is an important
7 variable.

8 Q. Nicotine is the most important variable
9 driving compensation, isn't it, Doctor?

10 A. Not always. And in fact, one of my earliest
11 studies in the area showed that nicotine was not the
12 most important factor, and that was published in the

13 Journal of Pharmacology and Experimental Therapeutics
14 in I believe 1981.

15 Q. Sir, am I correct that the issue of
16 ventilation hole blocking is related in a direct way
17 to addiction?

18 A. I believe it is related to addiction. I
19 believe addiction is part of the process that drives
20 it.

21 But the design of cigarettes is critical to
22 enabling it and the design of cigarettes is critical
23 to where it may or may not happen, sometimes when
24 people don't even realize it's happening.

25 Q. Am I also correct that smoker compensation is
1631

1 an important determinant of the addictiveness of
2 cigarettes?

3 A. No.

4 Q. No?

5 A. It's -- it can be influenced by the
6 addictiveness of cigarettes. You are getting your
7 variables mixed up. It's a consequence, not a cause.

8 Q. You do agree, though, that compensation is
9 related to addiction?

10 A. Yes.

11 Q. Sir, I need to approach it a different way.
12 What aspects of cigarette design are you prepared to
13 discuss today that are not related to addiction?

14 A. Very little of what I'm going to discuss
15 today is related to addiction.

16 My purpose today is to explain to the jury
17 what a cigarette is and how it works. This was
18 something that I was asked to do by the commissioner
19 of the United States Food and Drug Administration, and
20 some of my expert advice specifically on that topic
21 were incorporated in the Food and Drug Administration
22 Tobacco Rule. That wasn't on addiction.

23 Literally, it's -- you know, as you know,
24 it's a much more complicated process than the average
25 person understands. I'm not sure -- I would hope that
1632

1 when I finish people will understand better your
2 comments yesterday about selective and general
3 reduction, for example.

4 Q. Sir, I understand that you watched the
5 openings and that you want to help the plaintiffs
6 rebut my opening, but I have a different question for
7 you.

8 Please tell the Judge what aspect of
9 cigarette design specifically it is that you are
10 prepared to testify about that is unrelated to
11 addiction?

12 A. How cigarettes work, how they deliver
13 substances to the body, what happens when you light
14 it, how are things produced that are not present, what
15 is the relevance -- you talked about the importance of
16 dose/response in disease. What is the relevance of
17 cigarette design to dose/response.

18 Q. Can you explain that one for the Court?

19 A. Can I explain that?

20 Q. Yes, sir.

21 JUDGE RECHT: Well, as it relates to the
22 disease process or as it relates to addiction?

23 THE WITNESS: Well, there will be others

24 that will talk about the disease process per se. The
25 foundation I will provide is aspects of cigarette

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1 design that explain why, for example, you get cancers
2 with light cigarettes; how, for example, a light
3 cigarette, for example, may increase adenocarcinoma.
4 Now, I'm not an adenocarcinoma expert, but the design
5 features that I will talk about I think will be useful
6 to experts talking about adeno versus squamous cell
7 carcinomas, how that is possible. And that's related
8 to the design feature and the engineering of the
9 cigarette.

10 Q. Sir, will you tell --

11 JUDGE RECHT: I am going to to interrupt
12 this. I am going to give you five more minutes. I
13 mean, if you want to take a few minutes, it's five
14 minutes after a few minutes.

15 Hone in on what it is that you really
16 want to say, and I have got to bring it to an end. So
17 if you want a few minutes to collect your thoughts --
18 and I appreciate your not getting the responses in
19 that time. If you want to make it lean and mean, ask
20 exactly what you are looking for, because we have got
21 to get on with it.

22 But if you want to take some time to get
23 your thoughts together, I will be happy to do it.
24 It's not fair to do it on your feet.

25 MR. FURR: If I thought I could organize

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1 it better than I have, I would do that, Your Honor.

2 JUDGE RECHT: All right.

3 BY MR. FURR:

4 Q. Doctor Henningfield, tell the Judge what it
5 is about light cigarettes that causes people to get a
6 different type of cancer than full flavor cigarettes?

7 A. What I'm going to do is dissect cigarettes
8 and show some of the design features that can enable
9 that.

10 As to which specific design feature causes
11 which specific effect, I don't know. But there are
12 several different design features of cigarettes that
13 can enable that.

14 One of them, for example, is ventilation
15 holes that are placed so that a person's fingertips or
16 lips can cover them which would give you higher levels
17 of tar than they are rated at.

18 Another potential design feature are features
19 that enable the cigarette smoker to inhale smoke more
20 deeply into the lungs. And as Dietrich Hoffman and
21 others with expertise in cancer have gone into great
22 depth, you have to have exposure of the toxin in the
23 target area generally to produce cancers in the target
24 area. To produce the adenocarcinomas, you have to get
25 smoke deeply into the lungs. And this is why cigar

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1 smokers, for example, have a much lower incidence of
2 lung cancer in general, but a higher incidence in
3 mouth cancers.

4 Q. Sir, your point about ventilation holes,
5 isn't your point, sir, that you believe that people
6 block the ventilation holes, inhale strongly on light
7 cigarettes so that they can get the same amount of
8 nicotine they would from a full flavor cigarette, and

9 in doing so they draw the constituents of smoke deep
10 into the lung as a side effect of trying to get the
11 same amount of nicotine from the product as they would
12 from the full flavored product? That's your position,
13 isn't it, sir?

14 A. That's part of it. But you have taken one
15 tree out of the forest, and I hope through my
16 demonstration to provide the foundation for several of
17 the other trees that are important.

18 And how this entire process works, I think we
19 don't know. But --

20 Q. A few more questions is all I have.

21 A. -- but we know some of it.

22 Q. Doctor Henningfield, it's your opinion that
23 lung cancer is a side effect of nicotine addiction; is
24 that correct?

25 A. Yes.

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1 Q. And it's your opinion that chronic
2 obstructive pulmonary disease in smokers is a side
3 effect of nicotine addiction; is that correct?

4 A. In the smokers themselves, I believe that if
5 they were not -- because there is a dose/response
6 relationship, if they only smoked a few cigarettes, we
7 would see very low levels.

8 Q. So the answer to my question is yes, sir?

9 A. Yes.

10 Q. And sir, you talked a lot about being
11 involved in the development of medicines. But isn't
12 it true that your primary involvement with the
13 pharmaceutical industry is in the development of
14 nicotine replacement products?

15 A. It's my primary, but fortunately or
16 unfortunately, you don't know what my portfolio of
17 consulting is, and it goes considerably beyond
18 nicotine.

19 Q. Haven't you told me that you worked for
20 companies that make nicotine replacement products
21 almost every day of the week?

22 A. Yes.

23 Q. And over half of the income of your company
24 that you are a vice president in is derived from
25 companies that make nicotine replacement products?

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1 A. Absolutely.

2 MR. FURR: Your Honor, I will stop now.

3 JUDGE RECHT: All right. Let's say at
4 this time, and so I will give you an opportunity to
5 preserve your objection, this witness will be
6 permitted to offer opinions and conclusions within the
7 areas of cigarette design, engineering and
8 manufacturing, labeling and testing. He possesses the
9 requisite knowledge, skill, experience, training or
10 education that would permit those opinions and
11 conclusions to be offered under Rule 702.

12 He obviously also possesses the
13 knowledge, skill, experience, training and education
14 in areas beyond that, and specifically addiction,
15 nicotine dependence, and if this case were about that,
16 there would be -- that would be another area in which
17 he could also offer an opinion.

18 He will not be permitted to offer
19 opinions and conclusions within those areas today

20 because that is not an issue that is before this
21 Court. Because if it were an issue, there would be no
22 class certification because addiction of and in itself
23 is a sufficient barrier to class certification.

24 So he will not be permitted to offer any
25 opinions and conclusions within the area of nicotine

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1 dependence, addiction, habit, behavior, that's also
2 aligned with it, a little closer.

3 Now, just because he has those expertise
4 that he will not be permitted to testify to doesn't
5 mean that he does not also have the background,
6 training and experience in areas that he will be able
7 to testify to, and we just are going to have to be
8 rather careful.

9 And that's why I am being rather
10 specific with Doctor Henningfield to remind him that
11 those are the ground rules under which we are playing
12 in this particular lawsuit and for the reasons that I
13 have just stated. You should be entitled to know them
14 as well as anybody else so that we can be very
15 circumspect.

16 Because the consequences of going beyond
17 that area and into areas in which I know you have a
18 high level of experience and training could be -- the
19 consequences could be disastrous in regard to class
20 certification. So you might as well know that from
21 me. You may have been told that by your attorneys,
22 but now you know it officially.

23 THE WITNESS: And I'm comfortable with
24 that.

25 MR. FURR: One more thing. I did not

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1 probe any expertise on labeling because I believe that
2 there is no testimony that a witness could give on
3 cigarette labeling --

4 JUDGE RECHT: He just said labeling. I
5 don't know the areas. I don't even know what issues
6 we are talking about there. He said labeling.

7 MR. FURR: Any labeling post1969 is
8 preempted.

9 JUDGE RECHT: Is preempted anyhow, I
10 appreciate that. So I'm sure if it comes up -- we are
11 not trying this thing in a test tube. You still have
12 not waived your right to make whatever objections you
13 want to make, number one And, number two, to be able
14 to voir dire him in front of the jury.

15 MR. FURR: I appreciate that, Your
16 Honor, but my concern was because you ruled labeling
17 out of the case before --

18 JUDGE RECHT: It's out of the case.

19 MR. FURR: The witness might be under
20 the wrong impression to volunteer testimony on
21 labeling when he should not do so.

22 JUDGE RECHT: First, he should only
23 respond to questions that are asked. So if a question
24 is not asked about labeling, he will not answer about
25 labeling. All right?

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1 THE WITNESS: May I ask the question. I
2 use the word labeling -- used it in a very broad
3 context, so the Federal Trade Commission rating system
4 is what I was referring to.

5 JUDGE RECHT: I understand -- I do and I
6 don't understand. I understand what Mr. Furr is
7 talking about as an issue that's not in this case.
8

9 MS. DURAND: Your Honor, if I could
10 clarify, he will not be asked anything with respect to
labeling in the sense that Mr. Furr has just raised.

11 However, one of the things that
12 defendants have already opened up in their opening
13 statement is the issue that Doctor Henningfield just
14 touched upon which has to do with the tar levels that
15 are reported through, if you want to call it, a
16 label. And I would be eliciting testimony from
17 Doctor Henningfield with respect to the reporting of
18 levels of tar.

19 JUDGE RECHT: I understand. See,
20 labeling to me meant the warnings. That's the area
21 that we are not involved in now.

22 Now, if there are other areas in terms
23 of the actual copy on a cigarette that is relevant in
24 this case, fine.

25 MR. FURR: Well, Your Honor, now we have
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1 a different type of problem.

2 JUDGE RECHT: Why doesn't that surprise
3 me?

4 MR. FURR: It's as follows: In getting
5 this class certified, these plaintiffs took the
6 position over and over and over that differences
7 between cigarette brands were irrelevant to the issues
8 that were common to the class, and that the defect in
9 cigarettes applied equally across the board to all
10 brands and disavowed any intent to prove specific
11 defects in specific brands.

12 Now we hear they want to come in and
13 discuss design features, for example, in low tar
14 cigarettes that they say are defective. That can't be
15 common to the class, Your Honor, unless there is some
16 proof that every class member used low tar
17 cigarettes.

18 So what's about to happen now is after
19 saying things like individual particulars as to any
20 specific brand of cigarettes are irrelevant in this
21 action, that's the reply memorandum in support of the
22 brief, they also said individual particularities as to
23 any specific brand of cigarettes are irrelevant.
24 Those particularities do not go to the central causal
25 issue.

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1 Now they want to start litigating issues
2 that they abandoned in order to get the class
3 certified.

4 JUDGE RECHT: All right. Well, I don't
5 know if that's so or not. I do know that I heard a
6 great deal about tar in your opening statement, and
7 you can't raise something and then expect to sit down
8 and not have it responded to.

9 Now, as to how that comes into this
10 case, I don't know yet. But let's go ahead. Let's
11 bring the jury out.

12 * * *

13 (Whereupon, the following proceedings
14 were held in open court with a jury present:)

15 JUDGE RECHT: Okay. You all have your

16 notepads now. It's like your first day in school, you
17 have your pencil box.

18 All right, fine. Let's all be seated.
19 Do you want the witness sworn again in
20 front of the jury?

21 MS. DURAND: If you please.
22 JUDGE RECHT: Could you administer the
23 oath to Doctor Henningfield.
24 (The witness is sworn.)

25 MS. DURAND: Good afternoon, ladies and
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1 gentlemen.

2 The plaintiffs will call their first
3 witness now Doctor Jack Henningfield who has already
4 been qualified by the Court --

5 JUDGE RECHT: If you want to do that,
6 that was --

7 MR. FURR: It's fine by us, Your Honor.
8 JUDGE RECHT: All right, that's fine.
9 If you want to do that in front of the jury, that's
10 your call. I will be happy to if you just want me to
11 go ahead and recognize him now based on what we did
12 before?

13 MR. FURR: Yes, Your Honor.

14 MS. DURAND: Yes, Your Honor, as long as
15 I am then able to elicit some background testimony.

16 JUDGE RECHT: I will be happy to do it.
17 If you are offering this witness at this time based
18 upon the qualifications that were given before, I will
19 be happy to do that at your request.

20 And he will be considered to be an
21 expert witness under Rule 702 of the West Virginia
22 Rules of Evidence capable of giving opinions and
23 conclusions within the area of cigarette design,
24 engineering and manufacturing generally.

25 MS. DURAND: Thank you, Your Honor.

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1 * * *

2 JACK EDWARD HENNINGFIELD, Ph.D.
3 a witness herein, called on behalf of
4 the plaintiffs, being first duly sworn, was examined
5 and testified as follows:

6 * * *

7 DIRECT EXAMINATION

8 BY MS. DURAND:

9 Q. Doctor Henningfield, can you please state
10 your name for the ladies and gentlemen of the jury?

11 A. Jack Edward Henningfield.

12 Q. And can you please tell me what your
13 employment is?

14 A. I am an associate professor of behavioral
15 biology at the Johns Hopkins Medical School in
16 Baltimore. That is my academic appointment.

17 I'm a consultant for a small consulting
18 company in Bethesda, Maryland, called Pinney,
19 P-i-n-n-e-y, Associates, which does self-delivered
20 consulting, and I serve on a variety of advisory
21 committees, some of them are paid and some of them are
22 volunteer.

23 Q. And can you describe for the ladies and
24 gentlemen precisely what your position is with Johns
25 Hopkins University?

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1 A. I teach and do collaborative research. I'm a
2 part-time faculty, and like a lot of part-time
3 research faculty at Johns Hopkins, that means I give
4 lectures when called upon in the departments of
5 pharmacology primarily, the school of public health,
6 and the department of psychiatry.

7 Q. Thank you, Doctor.

8 And can you please tell me where you obtained
9 your undergraduate degree?

10 A. The University of Minnesota.

11 Q. And what was that degree in?

12 A. The primary degree was in psychology, and my
13 areas, main area of general study was biology.

14 Q. When did you graduate?

15 A. In 1974.

16 Q. And after graduating in 1974, did you do
17 further study?

18 A. Yes, I did.

19 Q. And can you explain to me what that was?

20 A. Yes. I was given a United States Public
21 Health Service fellowship to continue in the what was
22 called the psychopharmacology training program which
23 was at the University of Minnesota. It was our
24 nation's lead program studying drugs.

25 Q. And in the process of your education, did you

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1 obtain any other degrees?

2 A. A Ph.D. degree.

3 Q. And what -- and that was in that particular
4 field?

5 A. Yes.

6 Q. And after that, did you do anything -- did
7 you do any fellowships after receiving your Ph.D.?

8 A. Yes. I did a fellowship for the National
9 Council on Alcoholism, I did a -- there was
10 combination of junior faculty position/senior
11 postdoctoral position at the Johns Hopkins Medical
12 School -- it was really the beginning of my faculty
13 position there in 1978 -- and then a two-year
14 fellowship was awarded to me for the National
15 Institute on Drug Abuse in 1980.

16 Since 1978, though, I remained at the Johns
17 Hopkins School of Medicine as a faculty.

18 Q. Could you list for the Court and for the
19 ladies and gentlemen of the jury some of the awards
20 and honors that you have received throughout your
21 career?

22 A. I have been given awards from the United
23 States Public Health Service on a range of issues, and
24 this is included my work on reports of the United
25 States Surgeons General on the health effects of

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1 cigarette smoking, a report on the health effects of
2 smokeless tobacco use.

3 Work I have done on training areas. We set
4 up major training areas including a minority training
5 program that I received an award. I received an award
6 from the United States Department of Health and Human
7 Services for my advisory work to the Food and Drug
8 Administration on their cigarette rule or regulations,
9 the World Health Organization and -- is that enough?

10 Q. I think so, Doctor.

11 You mentioned the World Health Organization.

12 Are you involved in that organization in any way?

13 A. Yes.

14 Q. Can you describe for me what it is you do for
15 the World Health Organization?

16 A. Well, I consulted both I guess formally and
17 informally for a number of years.

18 The World Health Organization is the health
19 organization of the United Nations, and its primary
20 base is in Geneva. And the main area of activity that
21 I have had is on their tobacco advisory groups, their
22 cigarette regulation groups and conferences. That's
23 been my main area of activity.

24 And I currently serve on what is called their
25 Scientific Advisory Committee on Tobacco Products. I

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1 believe that one of the tobacco industry attorneys
2 mentioned the World Health Organization or that they
3 had worked with them. The committee that I sit on has
4 taken -- has a lot of statements from the tobacco
5 industry and I believe will continue to do so.

6 Q. And what is that committee, Doctor?

7 A. It's called the Scientific Advisory Committee
8 on Tobacco Products, and the focus is on the -- the
9 major focus is on cigarette modification and how the
10 products are made and manufactured.

11 Q. And Doctor, do you sit on any other
12 committees or boards or participate in any other
13 organizations in that field?

14 A. I served on expert groups for voluntary
15 organizations such as the American Cancer Society and
16 the American Lung Association at times over the years,
17 Centers for Disease Control, the Mexican-American
18 Binational Committee.

19 Yesterday one of the attorneys, I believe
20 Mr. Furr, mentioned the Health Canada group that they
21 had participated in. I have been one of the United
22 States' experts serving on the Health Canada
23 cigarette -- I believe it's called cigarette product
24 modification program, something like that. I served
25 on that.

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1 Q. And are there any other governmental entities
2 that you have participated in the area of, say,
3 tobacco modification or cigarette modification?

4 A. The main other governmental organization --
5 well, first, of course, the National Institutes of
6 Health where I was employed for sixteen years, but
7 also in that capacity as a scientific adviser to the
8 Food and Drug Administration.

9 So I have worked extensively with the Food
10 and Drug Administration since I guess about 1987 or
11 1988 was when I was first involved with FDA on
12 cigarette modification issues, and one of the awards I
13 received was formerly advising FDA on those issues.

14 Q. And in addition to acting as an adviser to
15 these committees and boards and organizations, have
16 you done any publication of papers or research that --
17 in that particular field, Doctor?

18 A. My -- I published more than 285 papers and
19 chapters, and that includes a couple of books and
20 monographs, and some of my earliest ones dealt with
21 cigarette modification issues, the effects of things
22 like ventilation.

23 Again, I think you heard that mentioned
24 yesterday, how ventilation affects delivery of
25 different things in cigarette smoke. I'm not sure

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1 what percentage of my studies, of my publications have
2 been involved. Not a large percentage. I have
3 published on a lot of areas.

4 Q. Okay. Doctor, now, given the sort of -- the
5 qualifications that we have already talked about, are
6 there a large number of people such as yourself that
7 hold those kinds of qualifications?

8 A. They are not outside the tobacco industry.
9 The tobacco industry, of course, employs people that
10 specialize in cigarette design.

11 Outside of the tobacco industry, there are
12 not a large number of us. Which is why if the Centers
13 for Disease Control sets up a group or the State of
14 Massachusetts in their efforts to look at cigarette
15 design set up a group, there are a fairly small number
16 of us that are called upon.

17 Q. So outside of people actually employed by the
18 defendants that are here today, there really aren't
19 too many of you that have developed this particular
20 type of expertise?

21 A. That's correct.

22 Q. And therefore, Doctor, I take it that you
23 wouldn't be -- you weren't too surprised when we
24 called you to ask you to testify here in this case?

25 A. No, not at all.

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1 Q. And can you explain to me why that was?

2 MR. FURR: Objection, Your Honor.

3 Relevance as to the witness' --

4 JUDGE RECHT: Sustained.

5 BY MS. DURAND:

6 Q. Doctor, do you -- have you testified in other
7 tobacco litigation in the past?

8 A. I have testified in two other cases.

9 Q. And therefore was it in the same type of
10 field as you are being asked to testify today or
11 similar field as you are being asked to testify today?

12 A. It's related. One of them was cigarette
13 focused and the other was smokeless tobacco focused.

14 Q. And I guess I take it, Doctor, then there
15 aren't too many people out there aside from those that
16 are employed by the tobacco industry that are
17 available to testify about these issues?

18 MR. FURR: Objection.

19 A. No, there are not.

20 JUDGE RECHT: Oh, that objection will be
21 overruled.

22 Let's get on with it. The witness is
23 here, the witness has been qualified.

24 MS. DURAND: Thank you, Doctor.

25 BY MS. DURAND:

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1 Q. Doctor, I'm going to move on to your direct
2 examination now, and I'm going to ask you a question
3 that may seem outrageously simple. Can you explain
4 for the ladies and gentlemen of the jury what a
5 cigarette is?

6 A. It depends who you ask, but the organization
7 that or governmental agency that primarily regulates

8 cigarettes is the Bureau of Alcohol, Tobacco and
9 Firearms, and they have a definition which is
10 basically a tube of tobacco wrapped in paper, and they
11 have some general size specifications and include the
12 fact that it may include a filter on it.

13 The Food and Drug Administration definition
14 includes the fact that it is burned under the ordinary
15 circumstances of its use, that's how you use it, which
16 seems obvious, but governmental agencies go to great
17 work to come up with definitions of what things are, I
18 guess.

19 Q. And that cigarette, as you have defined it,
20 have cigarettes always existed in the form that they
21 exist as we speak here today?

22 A. No. In fact, cigarettes are actually a
23 relatively recent invention, if you look at the
24 history of tobacco.

25 The history of tobacco goes back thousands of
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1 years that we are aware of, and when Columbus came and
2 the Portuguese and other sailors spread it around the
3 world, it was primarily used in the form of what we
4 would crudely call cigars and pipes, and cigarettes
5 were a much more recent phenomena. And today's
6 cigarette is way beyond a simple tube of tobacco
7 surrounded by paper.

8 Q. Now, did you create a chart that might assist
9 you in terms of describing the historical development
10 of cigarettes?

11 A. Yes, I have.

12 MS. DURAND: Could I have that chart put
13 up?

14 JUDGE RECHT: Do you want the lights
15 turned out?

16 MS. DURAND: Yes.

17 JUDGE RECHT: Okay.

18 MR. FURR: Excuse me, Your Honor, I have
19 no objection to this, but I would appreciate being
20 given a chance to see demonstratives before they are
21 put before the jury. I never saw them.

22 JUDGE RECHT: All right. Well, you
23 certainly should.

24 MS. DURAND: An oversight.

25 JUDGE RECHT: Do you want to look at
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1 them now before we go any further?

2 MR. MARKS: We were told no documents.

3 MS. DURAND: No documents?

4 JUDGE RECHT: Well, come on up.

5 (Whereupon, the following matter was
6 heard at benchside outside of the hearing of the
7 jury:)

8 JUDGE RECHT: I presume that you are
9 considering these to be demonstrative aids?

10 MS. DURAND: Purely.

11 JUDGE RECHT: And therefore on that
12 basis is the reason you didn't exchange them?

13 MS. DURAND: Your Honor, in our opinion,
14 this is like -- it's a little more technologically
15 advanced, but it's no different than asking the Doctor
16 to go up to the easel and write something down on the
17 easel. It's just facilitating --

18 JUDGE RECHT: I'm not saying that that's

19 not proper, but it just would move things along a
20 little bit if you have those, obviously you do, just
21 give everybody a copy of them so we don't have this
22 same problem again, that's all.

23 Just because you are not going to
24 introduce exhibits doesn't mean anything you are going
25 to use as an aid -- because at some point if there is

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1 an objection to a demonstrative aid, we can take care
2 of that in advance. That's all.

3 MS. DURAND: We will do that, Your
4 Honor.

5 (In open court:)

6 JUDGE RECHT: In answer to your
7 question, if you have one of those pointers, you can
8 use it.

9 THE WITNESS: Thank you very much.

10 BY MS. DURAND:

11 Q. As I was saying, Doctor, you had made up this
12 little chart that would assist us in going through the
13 historical development of the cigarette, and if you
14 could explain to the ladies and gentlemen of the jury
15 what you have put down here, I think we could move
16 through this fairly quickly?

17 A. Sure. This is just -- I have a one-minute
18 history that -- the whole history is just
19 fascinating.

20 But basically it was around the time of the
21 Civil War that people were wrapping paper, wrapping
22 tobacco with paper and doing it by hand and making
23 little things that came to be called cigarettes.

24 And they were becoming popular in kind of the
25 affluent society in Paris and London and New York, and

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1 they were rather expensive. They were hand-rolled. A
2 person could maybe make two thousand per day working
3 really hard. And it was after the Civil War that they
4 started to become more popular and declared more of a
5 status symbol.

6 People don't realize the impacts of little
7 discoveries, but one of the big things that allowed
8 the cigarette industry was the discovery or invention
9 of matches. If you don't have convenient, safe
10 matches -- and that's before lighters -- you didn't
11 have a lot of cigarette smoking.

12 So matches were -- came into -- some of the
13 earliest ones were discovered, oh, in about the
14 1830s. Some of them were actually pretty poisonous
15 and involved phosphorus and other things.

16 A big invention was by a Swedish person in
17 the 1850s. That's how recent the safer match is.
18 They patented it and started a company called Swedish
19 Match. Today Swedish Match, its main business is
20 cigarettes. It's main business became cigarettes and
21 smokeless tobacco. In the last year or two it's
22 gotten more into cigars and smokeless tobacco.

23 So Swedish Match was a company that was born
24 to make safety matches, and cigarette smoking became
25 kind of a side industry of having something to do with

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1 the matches, I guess. But matches were really
2 important.

3 Alan and Ginter and company in about the

4 1870s, I don't recall the year right now, held a
5 contest, and the contest was try to develop a
6 cigarette making machine that could really make a lot
7 of cigarettes.

8 James Bonsack won the contest. His machine
9 could make 120,000 per day. Remember, I said a person
10 could make about 2,000. That was a lot of cigarettes.
11 That was so many cigarettes that Alan and Ginter said
12 what can we do with this, it's ridiculous. I don't
13 remember what their exact words were, but they
14 basically passed on the device that they had fostered,
15 their contest fostered the device, and they got it and
16 they said we can't use it, where can we sell that
17 many.

18 A guy named James Buchanan Duke came along
19 and he said, humm, if we can make that many
20 cigarettes, I can sell them, I can build a market.
21 And he helped develop a major industry in the 1880s
22 and 1890s, and basically he paid for some kind of
23 special arrangement that he would get the machines
24 preferentially to other companies.

25 That for all practical purposes was the
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1 birth of a major industry in the United States and
2 globally for that matter. It spawned off a lot of
3 companies.

4 During -- at that time, though, it was
5 still a fairly crude device. It was basically an
6 automated way of taking shredded up tobacco, wrapping
7 it in paper and selling it.

8 The first half of the Twentieth Century,
9 a lot of the advances primarily had to do with tobacco
10 blends, like mixing Turkish and Virginia and other
11 tobaccoes. The breakthrough of Camel cigarettes, if
12 you will, at the beginning of this century was
13 blending cigarettes and coming up with something that
14 people liked more. Different efficient manufacturing
15 techniques, marketing, this is where a lot of the
16 activity was.

17 As part of that, in 1936, American
18 Tobacco Company developed a test for comparing
19 cigarette blends. This went back to 1936, and it
20 basically was a 35 milliliter puff every minute, and
21 it was a standardized way of comparing different
22 tobacco blends.

23 That test back in 1936 is the
24 cornerstone of today's Federal Trade Commission test.
25 The current test has roots that go back 60-some years.

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1 The 1950s and 1960s was a big event as
2 you heard yesterday in the cigarette industry. This
3 is when the cancer studies came out, and the cancer
4 studies showed that the risk was dose-related.

5 And this is really important. It was
6 discussed I believe by Mr. Furr yesterday, I was in
7 the courtroom for part of the day, and he talked about
8 the dose-related risk. What that meant was the more
9 smoke and the longer smoke, the higher your risk of
10 lung cancer.

11 And so a conclusion of the 1964
12 so-called bombshell Surgeon General's report, one of
13 the conclusions was that basically if you couldn't
14 stop taking that smoke, smoke lower tar cigarettes.

15 That was one of the conclusions. And that conclusion
16 was reconfirmed over the years. It made sense.

17 There were also what have been described
18 as the tar wars in cigarette advertising.

19 MR. FURR: Excuse me, Your Honor. I
20 object to this as being outside the scope of this
21 witness' disclosure. There is no foundation for his
22 expertise in this thing.

23 JUDGE RECHT: Well, he's giving kind of
24 a history lesson. I don't know what that has to do
25 with what we have qualified him for. It's

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1 interesting, but where does this tie into the areas of
2 design -- the areas in which he was qualified?

3 MS. DURAND: Would you like us to
4 approach, Your Honor?

5 JUDGE RECHT: All right.

6 (Whereupon, the following matter was
7 heard at benchside outside of the hearing of the
8 jury:)

9 MS. DURAND: Your Honor, the development
10 of cigarettes and the changes in the manufacturing
11 product and the production over time is key to the
12 jury's understanding of the testimony of not only this
13 witness, but ultimately and in the totality of our
14 case, the conduct of the defendants.

15 JUDGE RECHT: All right.

16 MR. FURR: I didn't make a relevance
17 objection. I said it's outside the scope of this
18 witness' disclosure. There is nothing about him being
19 an expert on the history.

20 I have another objection with the
21 demonstrative. Could you get a copy of the
22 demonstrative so I can show it to the Court? I didn't
23 see this -- since I didn't see it before, it was hard
24 to show to you. I didn't catch it.

25 It's not in this packet. That's why I

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1 didn't catch it.

2 JUDGE RECHT: The one that's on the --

3 MR. FURR: That's why I didn't catch my
4 objection.

5 MS. DURAND: What was the objection?

6 MR. FURR: The objection is -- do you
7 have a small copy of it so I can show it to the
8 Court?

9 MS. DURAND: No, I don't.

10 MR. FURR: You must have something that
11 you are projecting up there.

12 MS. DURAND: It's on the computer.

13 MR. FURR: We can send the --

14 JUDGE RECHT: We can send the jury back,
15 unless you have a sense of what it is.

16 MR. FURR: Yes. I think the third
17 bullet down indicates that the companies began to
18 intentionally try to beat the FTC test. He's
19 ascribing intent to us. He may testify that we did
20 things, but that's making us --

21 JUDGE RECHT: In terms of that
22 conclusion, that's the basis of your objection?

23 MR. FURR: That was one of them.

24 JUDGE RECHT: Well, that one is a good
25 one. Stick with that one.

1 I'm not concerned so much outside the
 2 scope if in fact it's related to the whole process of
 3 manufacturing. If it ties in, I'm going to permit
 4 it.

5 But I agree with you, he cannot comment
 6 on the conclusion of intent. If those are the
 7 underlying predicate facts, so be it. We will take
 8 those as we come. But there can't be any reference to
 9 basically a state of mind through this witness' eye.

10 MR. FURR: May I suggest, Your Honor,
 11 because I'm familiar with this witness' testimony, he
 12 needs to be told that or he will volunteer it
 13 constantly.

14 JUDGE RECHT: All right. Let's send the
 15 jury back. I don't like doing this, but --

16 MR. FURR: I apologize. I didn't see it
 17 because it's not there.

18 JUDGE RECHT: No, just because I don't
 19 like doing it doesn't mean you can't do it. I don't
 20 think it's good for everybody else, but we have to do
 21 what we have to do. Do you want to wait for the jury
 22 to go back?

23 JUDGE KAUFMAN: Just finishing
 24 that last point on there, he was up to the 21st
 25 century.

1 JUDGE RECHT: But it was on that
 2 particular one --

3 JUDGE KAUFMAN: You have an objection to
 4 that?

5 MR. FURR: Yes, he had not gotten to the
 6 point I'm objecting to.

7 JUDGE RECHT: So we need to get it up
 8 there.

9 JUDGE KAUFMAN: It's not in the folder?

10 MS. DURAND: I had not gotten to that
 11 last bullet --

12 MR. FURR: The last chart is not there.

13 JUDGE KAUFMAN: I'm sorry, I didn't pick
 14 that up.

15 (In open court:)

16 JUDGE RECHT: Ladies and gentlemen,
 17 again, because you won't hear us mumble, this
 18 oftentimes happen -- we try not to let it happen, but
 19 it does. So you can go back to your jury room, relax,
 20 and we will bring you right back as soon as we can.

21 (Whereupon, the following proceedings
 22 were held in open court without a jury present.)

23 JUDGE RECHT: All right, be seated.

24 Can you put up the graph that was on
 25 there before? And I guess it's the next one, is it

1 not? Here we are.

2 Where is the portion that you are --

3 MR. FURR: It's the third bullet.

4 Cigarettes designed to beat the FTC smoking machines.

5 JUDGE KAUFMAN: What's that mean?

6 JUDGE RECHT: Okay, that's a little
 7 different. I would have to look at it.

8 I thought -- you are equating -- well,
 9 still there is no question, it's still a state of
 10 mind. It doesn't say intent, but it still is a state

11 of mind.

12 MS. DURAND: Your Honor, if I might
13 respond, Doctor Henningfield will give testimony to
14 show that the specifics of the design show that it
15 does do something that is going to beat the FTC
16 smoking machines. There is a big difference --

17 JUDGE RECHT: Maybe what do we mean by
18 beat? Maybe I don't understand it. To me the
19 connotation is to somehow circumvent or to somehow get
20 around or to somehow try to be somewhat beguiling in
21 terms of avoiding what a regulation or regulatory
22 agency wants you to do.

23 MS. DURAND: If this is of any
24 assistance, the FTC smoking machines smoke a cigarette
25 in a very different way than an actual human being

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1 smokes a cigarette, and Doctor Henningfield will
2 testify about that and will testify about the way the
3 design of the cigarette even enhances the fact of that
4 difference.

5 JUDGE RECHT: I appreciate that. The
6 way it should be done is designed to be different
7 than. There are all kinds of ways of saying it.

8 The connotation to beat at this point,
9 you can say what has happened. It's going to be up to
10 the jury to determine that's what the net result was.

11 At some point, I guess, there could be a
12 set of facts upon which a person so qualified could
13 possibly talk about somebody's state of mind under
14 certain circumstances based upon a given set of facts,
15 but this witness is not in that category.

16 So either you withdraw it -- I mean, it
17 should say rocket science, modern chemistry,
18 engineering physical, cigarettes -- first off, the
19 syntax, it doesn't even make a heck of a lot of sense
20 to me. But cigarettes designed to beat the smoking
21 machines, I would just withdraw it.

22 I mean, at some point if he wants to
23 talk about it in terms of his testimony that he feels
24 that certain things were done in an effort to be -- to
25 be different than or --

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1 JUDGE KAUFMAN: Distinguished from.
2 JUDGE RECHT: -- distinguished from,
3 that's very good, then you can argue at some point
4 what all of that means.

5 MS. DURAND: Your Honor, if the only
6 problem is with the actual wording of that phrase
7 there and as long as Doctor Henningfield will be able
8 to testify regarding his experience and understanding
9 of this situation, then that would be fine with the
10 plaintiffs.

11 JUDGE RECHT: Well, yeah. I don't know
12 what it's going to be, but the witness would not be
13 permitted to really draw conclusions at this point as
14 to the state of mind of somebody. That's not what
15 he's qualified to do at this point.

16 If he were qualified, the ultimate
17 conclusion could be drawn under those circumstances
18 obviously. That's what an expert does. But I don't
19 see how he at this point, that's within his area of
20 expertise. It's certainly not in an area that was
21 disclosed.

22 MS. DURAND: Now, just so -- I will go
23 ahead and raise this now. We will be showing a video
24 clip of an actual FTC smoking machine.

25 JUDGE RECHT: All right. That's good.

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1 MS. DURAND: Well, I want to make sure
2 that I'm clear as to the defendants' position on this,
3 the video clip.

4 JUDGE RECHT: Does it say -- it doesn't
5 say this is designed to beat this machine or
6 something.

7 MS. DURAND: No.

8 JUDGE RECHT: Do you want to show them
9 what the machine looks like?

10 MS. DURAND: Yes, and to see this
11 machine actually in use.

12 JUDGE RECHT: All right.

13 MS. DURAND: However, the video
14 originally came with an audio clip, and initially we
15 were intending to show it with the audio clip.

16 At this point in time, we do not intend
17 to show it with the audio clip because it states in
18 the audio clip that the testing is being done for tar,
19 but also states that testing is being done for
20 nicotine.

21 There is nothing on the video visually
22 that says anything about nicotine, and so I just want
23 to inform the Court as to why we will not be
24 showing -- I mean playing the audio clip.

25 JUDGE RECHT: I appreciate that and I'm

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1 sure the defendants are happy to hear that.

2 The problem is, of course, if you would
3 exchange these things in advance, we would not have --
4 we wouldn't be confronted with this. And even though,
5 as we said during the bench conference, you can use
6 any demonstrative aid, even though they are not going
7 to go to the jury, I mean, it still is something that
8 has to be exchanged, and if there is an objection to
9 it, we have to take it up.

10 So, you know, from now on let's go ahead
11 and do that. It makes things run just a little
12 smoother.

13 All right. Now, so you are going to
14 withdraw this particular -- unless you can alter it
15 somehow. I don't know if you can do that?

16 MS. DURAND: Would it be sufficient for
17 the -- we will just not put it up, Your Honor.

18 JUDGE RECHT: All right, that would be
19 the safer thing to do.

20 MR. FURR: I have a second issue, Your
21 Honor.

22 JUDGE RECHT: Pardon?

23 MR. FURR: I have another issue.

24 JUDGE RECHT: But I do want again to
25 inform Doctor Henningfield that what we are looking

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1 for in some of these areas are simply the factual
2 predicates, and in certain areas you cannot give
3 opinions as to what's in somebody's mind. You may
4 believe that and you may feel we are suppressing you,
5 but unfortunately that's what we are going to be doing
6 here today.

7 THE WITNESS: I think I understand that
8 and I appreciate it.

9 May I ask a question before we get to
10 it?

11 JUDGE RECHT: Sure.

12 THE WITNESS: One of the cigarettes that
13 I intend to dissect is called Barclay, and Barclay was
14 a cigarette that employed design features that
15 Philip Morris and R. J. Reynolds sued the Federal
16 Trade Commission over. Their contention was it
17 circumvented the machine, and the Federal Trade
18 Commission -- it was a complicated story.

19 That's just the factual record. It was
20 part of why the Federal Trade Commission stopped doing
21 the testing. Is it okay to say that without saying --

22 JUDGE RECHT: I don't know, it depends.

23 In a vacuum I don't think there is a problem. It
24 depends upon the context of the question and what that
25 is in response to.

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1 If in fact that -- it's the kind of
2 thing, though, we are talking about in terms of a fact
3 rather than an opinion as to what it's designed to do.

4 THE WITNESS: Okay, thank you.

5 MR. FURR: I don't want to get
6 sidetracked on that testimony. I'm not sure
7 Doctor Henningfield is going to be able to describe to
8 the jury the lawsuits that were filed, legal claims
9 that were made, rulings by courts and why federal
10 agencies made decisions in light of those rulings.
11 That's not disclosed, and I don't think he can
12 personally do that anyway.

13 But we have something else. I didn't
14 hear this, Your Honor, but Sean Wajert did and he
15 never mishears anything I'm told.

16 I believe -- and I don't have realtime
17 here -- just a few minutes ago Doctor Henningfield was
18 talking about the Surgeon General's report, and he
19 said -- and I'm sure this was inadvertent, I'm not
20 saying it was intentional, but I believe he said that
21 the Surgeon General reported that if smokers could not
22 stop, they should smoke cigarettes with less tar. I
23 think that's what he said.

24 I know it wasn't intentional, but that's
25 exactly the type of thing we have got to guard

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1 against. The testimony about not being able to stop
2 only raises one issue and we all know what it is.

3 JUDGE RECHT: This is in the middle of
4 the answer: I was in the courtroom for part of the
5 day and he -- referring to Mr. Furr -- talked about
6 the dose-related risk. What that meant was the more
7 smoke and the longer smoke, the higher your risk of
8 lung cancer. And so the conclusion of the 1964
9 so-called bombshell Surgeon General's report, one of
10 the conclusions was that basically if you couldn't
11 stop that smoke, smoke lower tar cigarettes. That was
12 one of the conclusions, and that conclusion was
13 reconfirmed over the years. It made sense. There was
14 also what have been described as the tar wars in
15 cigarette advertising.

16 I presume that's what you were referring
17 to?

18 MR. FURR: Yes, sir.
19 JUDGE RECHT: All right. It's in an
20 area that we have to certainly be rather careful. How
21 do you want me to handle it?

22 MR. FURR: Well, at this point, Your
23 Honor, all I would like is for the witness to be
24 instructed again not to slip into those areas and to
25 be reminded of the consequences of creating a record

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1 here that pollutes this jury with issues that the
2 Court has repeated over and over again must be kept
3 from the jury or else class certification is at risk.

4 JUDGE RECHT: Well, all right, I will do
5 that. You see, were they -- and I will say this in
6 front of this witness.

15 So the only advice that I could give now
16 is that the questions -- excuse me, that the answers
17 should be in response to the questions.

18 MR. FURR: Your Honor, that was going to
19 be the next issue I was going to raise. With all due
20 respect to Doctor Henningfield, although I don't know
21 him personally well, I know his testimony well. And I
22 submit that it is not an unusual occurrence to have
23 long answers and include information that is not
24 responsive embedded within an answer that is
25 responsive. That's the problem Your Honor has just

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1 identified.

9 I don't think the witness should be in
10 the business of making closing arguments, Your Honor.

11 JUDGE RECHT: All right. I agree. I
12 don't know how else to say it other than to say that
13 the answers should be responsive to the questions
14 because of -- particularly in regard to this witness.

15 I realize that many times a person who
16 is highly qualified sometimes just tends to be
17 somewhat expansive. We all see it. It's not good
18 even then, but here it can be lethal in terms of the
19 ultimate consequences.

20 Sometimes you are able to just be able
21 to tell the jury certain things. But again, we are
22 walking through a mine field and we are just trying to
23 walk on all the stones and we don't want to slip
24 needlessly.

25 So I'm talking to Ms. Durand, but

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1 obviously I'm also trying to convey that same thought
2 to you, sir.

3 THE WITNESS: I apologize, and I
4 certainly wasn't intending to mock anyone.
5 JUDGE RECHT: You don't need to
6 apologize. Let's just try to get through this as best
7 we can.

8 Now, what do you all want to do? Let's
9 take a little break, and then I want to go on without
10 interrupting again. As long as the jury is out, go
11 ahead and take and do whatever you have to do to relax
12 a little bit. Eight minutes.

13 (A recess is taken.)

14 * * *
15 (Whereupon, the following proceedings
16 were held in open court without a jury present.)

17 JUDGE RECHT: Okay.

18 MS. DURAND: There is an additional
19 issue which probably should be addressed, Your Honor,
20 and that is that there is a chart that's a chart that
21 has already been shown to the jury in Mr. Hulsey's
22 opening statement, but it has been changed to take out
23 nicotine. And apparently I'm told the defendants have
24 an objection to the use of this chart.

25 JUDGE RECHT: Can I see it or is that

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1 the only -- is that the only one? Well, go ahead,
2 it's better you see it.

3 MS. DURAND: I have an extra copy.

4 JUDGE RECHT: All right.

5 MR. FURR: Your Honor, my objection is
6 that although it's still not clear to me exactly what
7 the scope of this witness' testimony will be, I am
8 under the impression --

9 JUDGE RECHT: You mean in regard to this
10 document?

11 MR. FURR: Yes.

12 JUDGE RECHT: All right.

13 MR. FURR: I am under the impression
14 this witness is not here to discuss what substances in
15 cigarette smoke is carcinogenic.

16 I think it was clear this was not the
17 witness that is going to make the connection between
18 the chemistry of smoking and health effects.

19 I also think this witness is here to
20 talk about the way that tobacco is treated and grown,
21 the soil treatment, sucker control, insect control,
22 weed control, fertilizers. There has been no
23 qualification of this witness in the growing of
24 tobacco, and certainly no disclosure of the witness in
25 that regard.

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1 So I'm objecting to both the right and
2 left side of this chart. And the only thing on this
3 chart that was mentioned that this witness was going
4 to talk about were additives.

5 MS. DURAND: Your Honor, this witness
6 clearly is not going to be talking about soil
7 treatment or any of the things on the left hand of the
8 chart, and although he may be able to state that there
9 are certain carcinogens in cigarette smoke, I think I
10 did elicit testimony from him in the qualifications
11 stage about the fact that he does have expertise in
12 what exists in cigarette smoke.

13 He definitely is not being offered as a

14 witness to tie up the chemistry of the effects of
15 those carcinogens on smokers in general. However, he
16 is capable of talking about the ingredients and the
17 additives and to a limited extent the carcinogens and
18 the compounds that are found both in the cigarette
19 itself prior to burning and in the smoke during
20 burning.

21 And I'm not offering this chart as being
22 covered on every single point by this particular
23 witness. It's my understanding we will have witnesses
24 later on who will tie up the chemistry and the
25 medicine involved with this.

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1 JUDGE RECHT: All right. Why do you
2 need this, number one? What's the purpose of -- this
3 is a demonstrative aid?

4 MS. DURAND: Yes, Your Honor.

5 JUDGE RECHT: And how is it an aid? For
6 what purpose?

7 MS. DURAND: It's an aid because this
8 witness essentially, to make -- just succinctly
9 summing it up, he's giving the jury a course in
10 Cigarettes 101.

11 They are going to see here there is a
12 variety of things in cigarettes, and it's not just a
13 bunch of tobacco rolled up in paper. It's not just a
14 bunch of tobacco rolled up in paper, and that's one of
15 the things that we especially wanted him here as our
16 first witness for, so that he could dispel any notions
17 in any of the jurors' minds that this is a very simple
18 process that isn't planned very carefully by these
19 defendants.

20 JUDGE RECHT: All right. Do you need
21 the left side? I mean, that's all part of the
22 ingredient aspect of it, is that what you are saying?

23 MS. DURAND: Yes, that's --

24 JUDGE RECHT: That's the soil treatment
25 and et cetera and the various things that go into

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1 tobacco, I presume?

2 MS. DURAND: That's what comes into the
3 leaf as an organic.

4 JUDGE RECHT: I'm going to permit it and
5 you can have your objection.

6 Now, are we ready?

7 MS. DURAND: I believe so.

8 (Whereupon, the following proceedings
9 were held in open court with a jury present.)

10 JUDGE RECHT: All right. Be seated,
11 please.

12 All right. Ms. Durand?

13 BY MS. DURAND:

14 Q. Doctor Henningfield, before we broke for a
15 period of time, I believe we were at the point of
16 discussing sort of the history of the modern
17 cigarette. And if I recall correctly, you had just
18 explained in the 1950s and 1960s the increased use by
19 the cigarette industry of filters and the advertising
20 campaigns that they had engaged in with respect to
21 tar. Am I correct in that?

22 A. Yes.

23 Q. Now, what happened in 1967 that impacts on
24 the history of the modern cigarette?

25 A. This is when the Federal Trade Commission

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1 began testing cigarettes, and it developed a test.
2 And the idea was to instead of having companies
3 compete and make claims comparing apples and oranges
4 and watermelons, they would have the companies all use
5 the same test.

6 And so the basis for the test was the 1936
7 test that had been published, and the FTC started
8 testing brands of cigarettes, and then in about 1970,
9 '71, came to the agreement with most of the major
10 cigarette companies that any time the cigarettes were
11 advertised, that they would include the ratings from
12 the test.

13 Q. Now, Doctor, when you said test, what test
14 are you talking about? What kind of test was being
15 undertaken here?

16 A. The test that people, I think it's most
17 commonly referred to as the FTC test or the Federal
18 Trade Commission method, because it was the Federal
19 Trade Commission that developed and required the
20 testing, and in fact they did the testing in the
21 initial years.

22 And so when you see a cigarette
23 advertisement, it will say FTC method for tar
24 delivery, for example.

25 Q. And when you are talking about a test, how

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1 was this testing accomplished?

2 A. The cigarettes were put in a smoking machine,
3 and the machine smoked cigarettes, and then you
4 collected everything that came out of the cigarettes
5 that went into the machine, and basically measured it.

6 Q. And specifically tar was measured?

7 A. Yes.

8 Q. Okay. Do we have something or did you bring
9 something with you today that would assist the jury in
10 understanding precisely how this testing procedure was
11 accomplished?

12 A. Yes. I would love to show them just a couple
13 minute clip of what the machine and process physically
14 looks like.

15 Q. Okay.

16 MS. DURAND: We have a video. If we
17 could cut the lights and show the video for the ladies
18 and gentlemen of the jury, I think this would be a
19 good time to do it.

20 JUDGE RECHT: All right.

21 THE WITNESS: This runs for about five
22 minutes.

23 JUDGE RECHT: Maybe you better turn out
24 all the lights. Is that all right now?

25 (A video is being played.)

1681

1 BY MS. DURAND:

2 Q. Now, is this the testing machine we see right
3 here?

4 A. Yes, this is a machine that was used in the
5 1970s. I believe the FTC used it through the 1980s.
6 There are fancier and different types of machines, but
7 this is the core methodology.

8 And basically you insert cigarettes in little
9 round portholes, and you can see a person inserting a

10 cigarette in a little port and putting them up there.
11 The cigarettes are lit, and the machine --
12 there are different ways of doing it, but if you
13 imagine a giant syringe that sucks air from the
14 cigarette, through the cigarette and into the machine,
15 and it does a lot of cigarettes at a time.

16 Q. How many cigarettes total did it do at a
17 time?

18 A. Oh, gosh, I don't know how many ports this
19 machine had, but for any given brand -- there have
20 been different agreements over the years, but I
21 believe at one point initially it was two hundred
22 cigarettes of each brand. They had different sample
23 collection procedures at times when they get them from
24 different parts of the country.

25 Q. How far down did it smoke the cigarette? Was
1682

1 it just a couple of puffs or did it smoke it down to
2 the filter?

3 A. Well, the cigarettes are different lengths,
4 and some of them have filters and some of them don't
5 have filters.

6 So to standardize the method, the cigarettes
7 were smoked to a 23 millimeter butt length if they
8 didn't have a filter, and if they had a filter, the
9 filter, I will show you in a few minutes, is attached
10 oftentimes to the tobacco rod that's called a paper
11 overwrap and it would smoke it three millimeters out,
12 a little more than -- a little less than a quarter of
13 an inch out past the paper overwrap.

14 It's kind of a crude mechanism, but a piece
15 of string was pulled taut over the cigarette, and when
16 the cigarette burned down and burned through the
17 string, then a little electronic switch was triggered
18 and the porthole would automatically shut.

19 Q. So, Doctor, did the little porthole lead to
20 some kind of collection tube, or what was on the back
21 of that?

22 A. Yes. The smoke is drawn through a filter,
23 and it was called a Cambridge filter. And if you
24 imagine a very thick coffee filter, it's working in
25 not a completely dissimilar way, bringing the smoke

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1 through it in these 35 milliliter puffs, taking one
2 puff every one minute, and the puff was a two-second-
3 long puff, and smoked it to this standard length.

4 Q. And then how was the actual residue or the
5 smoke that went into the collection tube tested?

6 A. Well, the filters would then be analyzed for
7 what was in them. Tar is basically everything that's
8 in a filter minus a couple of chemicals. That's
9 basically how tar is defined.

10 There is gases like carbon monoxide that are
11 measured with infrared methods and other ways. But
12 the filter traps particles, and these are then
13 measured on the filter pad. And this is the way that
14 you get the tar rating of the cigarette.

15 Q. And Doctor, why is tar important?

16 A. There you can see the little switch
17 triggering.

18 I'm sorry, tar, of course, is related -- the
19 amount of tar that you take in is generally assumed to
20 be related to the risk of cancer and other diseases.

21 Q. Before we go on, I think that's the end of
22 the clip. We can put the lights back on.
23 A. And on that clip, you saw smoke going up.
24 That smoke was not being trapped by the filter
25 obviously. That was just going up and out through an

1684

1 exhaust system.

2 So the puffs are being drawn through this
3 tubing, through the filter, the filter is capturing
4 material, and in between puffs side smoke is going up,
5 and that's what you saw going up and basically that's
6 going out of the building.

7 Q. Doctor, I believe you just stated that tar
8 was important or levels of tar are important because
9 tar is associated with risk of lung cancer. Is that
10 what you just stated?

11 A. Yes. And that's what the tar wars and tar
12 derbies were about.

13 Q. So if we return to the smoking machine, the
14 FTC took the data that it received from the machine
15 testing, and what did it do with that data?

16 A. Those data were -- core data were included
17 when you advertised cigarettes. So to this day, if
18 you see an advertisement for a cigarette in a magazine
19 or on a billboard, then it will include the results of
20 the FTC test method.

21 Q. Okay. And I think that there was some
22 mention about the tobacco industry actually making a
23 big effort to try to reduce tar levels between 1954
24 and 1998. Did you hear that in opening statement
25 yesterday?

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1 A. Yes.

2 Q. And what's your reaction to that?

3 MR. FURR: Objection, Your Honor. Vague
4 and ambiguous.

5 JUDGE RECHT: The objection will be
6 sustained.

7 BY MS. DURAND:

8 Q. Okay. Doctor, based on that, do you have
9 anything in your background and expertise that
10 responds to that particular assertion?

11 MR. FURR: Same objection.

12 JUDGE RECHT: Overruled.

13 A. I worked with the Federal Trade Commission,
14 the Centers for Disease Control and the Food and Drug
15 Administration to assess what the basis for that was
16 and the degree to which tar levels were decreased in a
17 meaningful way to people.

18 If you just looked at the machine tests, it's
19 true that the machine tar ratings decreased
20 approximately 70 percent from the 1950s to the late
21 1990s. Now, most of that reduction was actually
22 during the 1960s and early '70s, and there hasn't been
23 too much of a reduction since that point in the
24 general market. But that reduction was to the machine
25 tests.

1686

1 Q. And Doctor, do actual human beings smoke a
2 cigarette in the same manner that that machine that we
3 just saw smokes a cigarette?

4 A. No. And that was the concern of the Food and
5 Drug Administration, the Centers for Disease Control,

6 and it's the concern that led the Federal Trade
7 Commission itself to say that the method was flawed
8 and needed to be changed and is presently trying to
9 correct the method.

10 MR. FURR: Excuse me,
11 Doctor Henningfield.

12 Your Honor, I apologize to interrupting,
13 but I object to the nonresponsive answer, the
14 editorializing, and the reference to hearsay
15 statements, and move the answer be stricken and ask
16 the witness be instructed to respond to the question
17 being asked and not to volunteer other information.

18 JUDGE RECHT: The objection will be
19 overruled on the specific objection.

20 Your general comment is a proper
21 comment. I believe that that answer was responsive,
22 but there is to be no editorial comment, if that is
23 the basis of your objection.

24 MR. FURR: And the hearsay reference to
25 what others have said, Your Honor.

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1 JUDGE RECHT: He's an expert, now. This
2 is an expert. Take a look at the rule.

3 I mean, he can -- I mean, as you know, I
4 mean, just because that some of the areas are not
5 admissible does not mean that he cannot rely on them.
6 You can cross-examine on these areas.

7 You are normally correct, but you are
8 not now.

9 MR. FURR: I understand that with
10 reference to facts and data, but not with reference to
11 the opinions of others. I don't think the rule allows
12 the witness to do that.

13 JUDGE RECHT: All right. Well, your
14 objection will be overruled. I will be careful about
15 that. I can't right now -- I don't know if that was a
16 fact opinion. But maybe you are correct. We will be
17 rather vigilant.

18 BY MS. DURAND:

19 Q. Okay. Now, Doctor, if I might regress a
20 little bit to make sure that we are starting from
21 where we left off, the FTC has acknowledged that its
22 testing procedures do not necessarily reflect the
23 manner in which an actual smoker would smoke a
24 cigarette; is that correct?

25 A. Yes.

1688

1 Q. Now, do you in your experience and analysis
2 and study of cigarettes, do you have an understanding
3 as to why that doesn't reflect the way an actual human
4 being smokes a cigarette?

5 A. Yes.

6 Q. And can you explain why an actual human being
7 who is in the process of smoking a cigarette does not
8 do it in the same manner that a testing machine such
9 as we what we have just seen does?

10 A. Yes. The core issue I believe is that the
11 method goes back to the 1930s to when cigarettes were
12 a very different beast and a much simpler product, and
13 that the method has not kept pace with the enormous
14 evolution in cigarette design.

15 So the cigarette design has changed so
16 dramatically that the method that was developed

17 decades and decades ago is no longer very useful.
18 Q. Well, let's talk about that. What are the
19 changes in cigarette design that have happened over
20 the years that make that original testing method not
21 applicable to the cigarette that we know today?

22 A. Let me mention a couple of them.

23 The ventilation techniques, the method has no
24 means that are employed to cover ventilation holes.
25 But if ventilation holes can be deliberately or

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1 accidentally blocked by the smoker's mouth or lips,
2 then the smoker would get -- could get a lot more
3 smoke than the machine would get. And this was one of
4 the -- one of the challenges by one of the tobacco
5 companies in the '70s concerned that issue.

6 Q. And by ventilation holes, can you explain for
7 the ladies and gentlemen of the jury what you are
8 talking about? What ventilation holes are on
9 cigarettes?

10 A. It might be easiest to show the jury with the
11 laminated transparency or the model.

12 Q. That's probably a very good idea.

13 MS. DURAND: Your Honor, may the witness
14 step down and may we show on this ELMO projector the
15 laminations that we have?

16 JUDGE RECHT: All right.

17 THE WITNESS: Can you folks hear me okay
18 or do I need a microphone?

19 JUDGE RECHT: Can you all hear him?

20 Just keep your voice up. If you start
21 to taper off, we will give you a hand mike.

22 THE WITNESS: Thank you.

23 This is a laminated --

24 MS. DURAND: Doctor, we need to.

25 THE WITNESS: Okay. This is lamination

1690

1 that I made the other night. I made three of them,
2 and I believe it will be -- or I would like to let the
3 jury look at it if they could and you will see why I
4 make that request.

5 BY MS. DURAND:

6 Q. Let's just explain to the jury before we go
7 any further, before we allow them to take a look at
8 it, what is on here, Doctor Henningfield?

9 A. Okay. Here is a Kool cigarette, part of the
10 paper that goes from the cigarette end that goes into
11 your mouth, and then the white part that would
12 normally be a couple more inches longer that would
13 hold the main tobacco part.

14 I selected a number of brands just to
15 illustrate some different aspects of cigarette
16 design.

17 And in this Kool cigarette, I thought this
18 one would show up. This is why you will need to look
19 at it more closely. Let me see if I can see it with a
20 back light.

21 Okay. Now, with a back light, if you can see
22 these little tiny holes, they don't look like much,
23 but those are ventilation holes. And if the cigarette
24 is put inside a machine port and air is sucked through
25 it -- imagine an inner tube that is leaking air. And

1691

1 if you just puncture it with little tiny holes, all of

2 the sudden air rushes out of those holes.

3 Here the opposite thing happens. By putting
4 these little tiny holes in, the machine is inhaling
5 some fresh air, so it's diluting the smoke.

6 So how do you get a lower tar cigarette?

7 Well, one way is very simple: You dilute the smoke.

8 Now, that does more than just make the tar
9 rating lower. It can make it -- it can change the
10 chemistry, it can make it feel smoother, it can give
11 it other characteristics. It can make it easier to
12 inhale because it's not as concentrated.

13 On some cigarettes it's easier to see the
14 holes than others. Here is a Carlton.

15 On some cigarettes, these Marlboros, it's
16 very difficult to see. But I think if you take this
17 and hold it up to the light, then you can see the
18 holes for yourself.

19 My son helped me make this, and he called it
20 the Where is Waldo Game because with each one we would
21 try to find them.

22 And as I mentioned, on some it's pretty easy,
23 and on some it's more difficult.

24 Q. So, now, Doctor, just a question here. All
25 of these that are on the laminates that we will pass

1692

1 around to the members of the jury later on if the
2 Court will allow that, have holes, some in different
3 places, in different amounts. What's the significance
4 of that?

5 A. Well, the Marlboro cigarette, if you look
6 closely, has one ring of holes right here.

7 Now, there are different methods of making
8 these holes. They used to be done and are still done
9 by some companies electrostatically, but now the more
10 sophisticated method is with laser perforations.

11 They can also be done and then covered with a
12 scrim of paper so you can literally, if you look at
13 Tobacco Reporter in the 1980s, they advertise
14 machinery for making the holes and would advertise
15 that you could make it more easily visible or
16 invisible. It's a sophisticated technology to do it.

17 The Marlboro Regular has one ring of holes.

18 The Marlboro Light has two rings of holes. That's one
19 of the most important differences between the Marlboro
20 Regular and the Marlboro Light. It's what allows
21 dropping the tar rating by a few milligrams to the
22 machine, adding a little bit more fresh air.

23 Q. So let me make sure I understand this,
24 Doctor. Because there is an additional layer or an
25 additional ring of holes, more fresh air comes in to

1693

1 mix with the smoke and therefore lessens the tar. Is
2 that about what it is you are saying?

3 A. That's exactly what happens. More fresh air
4 means smoke to the machine that has more fresh air in
5 it and less other things.

6 Q. And when all these cigarettes -- and these
7 are just examples of cigarettes, these cigarettes.
8 There are other brands beyond these, but when these
9 cigarettes were put into that machine that we just
10 looked at, did they all get placed into the machine in
11 a similar position, along the end of the cigarette?

12 A. They are all placed so that the holes will

13 specifically not be covered in the machine. And in
14 the earlier days there was at least one company that
15 had -- that their cigarettes, the holes were so close
16 that they were concerned that they would be covered by
17 the machine and get higher values. And they protested
18 to the Federal Trade Commission.

19 MR. FURR: Excuse me, Doctor.

20 Your Honor, may I approach?

21 (Whereupon, the following matter was
22 heard at benchside outside of the hearing of the
23 jury.)

24 MR. FURR: Your Honor, I'm trying very
25 hard not to object to these, but he keeps volunteering

1694

1 hearsay statements of others that are entirely
2 prejudicial, and because he's testifying, I can't stop
3 him.

4 And I'm going to provide one or two
5 examples. When he was talking about the machine for
6 making holes, he said it was advertised so that the
7 buyers knew they could make them visible or invisible,
8 creating the inference that we might buy them and
9 purposely make them visible. It's a totally
10 gratuitous comment that had nothing to do it with the
11 question. He just did it again, Your Honor.

12 JUDGE RECHT: That's a little
13 different. He's permitted to give facts and data even
14 though they are not admissible, that's number one.
15 That's what we talked about before.

16 But he is the kind of witness, if you
17 excuse the expression, if you ask him the time, he
18 tells you how to make the watch.

19 Just ask him please to just please be
20 responsive. When you ask him the time, just tell the
21 time, don't allow him to go on. If you need
22 additional time to go into areas that you think -- but
23 he's just offering things. Therein lies -- the
24 potential for some mischief in this area is just
25 exponentially increased. So just caution him to

1695

1 answer your questions.

2 MR. FURR: What was happening right now,
3 she asked him did they place the cigarettes in the
4 same hole, and he's now volunteering some story about
5 what some company thought and what another company --
6 it keeps happening. I can't do anything about it.

7 JUDGE RECHT: I will ask you to do it
8 this way now. But if it keeps going on, I'm going to
9 really have to come down on him, and I don't think you
10 want me to do it. I don't want to do it to any
11 witness. It's not fair.

12 But he does offer a lot of gratuitous
13 comments. It's something that is almost an epidemic
14 with all experts. I don't know how to ever change
15 that other than the fact he may have to follow your
16 lead somehow.

17 MS. DURAND: Yes, Your Honor.

18 MR. FURR: Can we instruct him again,
19 Your Honor?

20 JUDGE RECHT: At this point, I want
21 Ms. Durand simply to say just please confine your
22 answers to my questions and that's it. Let's do that.

23 MS. DURAND: I will do that.

24 JUDGE RECHT: And if not, I will step
25 in.

1696

1 MS. DURAND: I will do that, Your Honor.
2 (In open court:)

3 BY MS. DURAND:

4 Q. Now, Doctor, as we were discussing, I think,
5 or as you were discussing, I had asked you about the
6 holes that are placed in the cigarette papers and we
7 were looking at those here on the ELMO.

8 I'm going to be asking you specific
9 questions, and if we can focus in only on the
10 questions I'm asking as opposed to anything else that
11 might be coming in, I would appreciate it, Doctor.

12 Now, getting back, I'm trying to recall
13 precisely where we were.

14 I believe you had stated something to the
15 effect of where the cigarettes are placed in the
16 actual machine that tests the cigarettes for the FTC.
17 Is that correct?

18 A. Yes.

19 Q. And we were going through and you were taking
20 a look and talking about the placement of the holes in
21 the various examples that we have here in the
22 lamination, and I believe that we were discussing the
23 Marlboro cigarette which had an additional row of
24 holes in it that allowed for more fresh air to come
25 into the cigarette during the testing process; is that

1697

1 correct, Doctor?

2 A. Yes. And due to the position or the
3 lighting, you might be able to just barely see this
4 dual ring of holes right here.

5 Q. And because of that extra row of holes, it's
6 essentially a lighter cigarette or a lower tar
7 cigarette?

8 A. It provides more fresh air through the end of
9 the cigarette and to the smoking machine.

10 Q. And thus receives a lower tar rating in the
11 actual dissection of the smoke compound?

12 A. That's the basis then that is used by
13 Philip Morris --

14 MR. FURR: Objection, Your Honor.

15 JUDGE RECHT: All right. The objection
16 will be sustained.

17 Now, there was a specific pointed
18 question that calls for a specific answer. It does
19 not call for anything beyond that. If, in fact, there
20 is going to be another question framed in that area,
21 so be it. But please confine your answers, sir, to
22 the questions that are asked.

23 THE WITNESS: Okay.

24 BY MS. DURAND:

25 Q. And this is specific to the Marlboro and

1698

1 Marlboro Lights, Doctor, so we can talk --

2 MS. DURAND: Is Your Honor suggesting
3 that we cannot mention the name? I would like
4 clarification.

5 JUDGE RECHT: I just want the answer
6 specifically to the question. You asked a question,
7 and your questions are really narrow questions, I
8 think they are good questions calling basically for a

9 simple, direct answer. And you are doing exactly what
10 you should be doing, but unfortunately the answers are
11 going beyond that.

12 BY MS. DURAND:

13 Q. Okay. So Doctor, let's return to this. The
14 difference between the Marlboro and the Marlboro Light
15 with the additional row of holes and to achieve the
16 lower tar in the testing at the FTC is on the basis of
17 fresh air coming into the cigarette at a greater rate
18 in a lighter cigarette; correct?

19 A. Yes.

20 Q. And is that something that is common to other
21 lighter cigarettes, that they have additional holes
22 placed in them to allow for more fresh air in the
23 testing process?

24 A. Yes.

25 Q. And do you have any additional brands that

1699

1 reflect that that has been done?

2 A. Yes.

3 Q. And are there any on this lamination that
4 show that there are certain brands that are supposedly
5 lighter cigarettes that have additional holes in them?

6 A. Yes.

7 Q. Can you point those out for the ladies and
8 gentlemen of the jury?

9 A. Sure. Should I show you each brand on the
10 lamination?

11 Q. That would probably be the easiest way of
12 doing it.

13 A. This is the Barclay, which has this triple
14 ring here and a larger ring here.

15 The GPC Menthol does not have holes, at least
16 that I can see on this machine, but the GPC Ultra
17 Lights does.

18 The Salem Lights has a ring.

19 The Kool -- oh, I'm sorry, these are Kool
20 Lights has a ring. My son cut the things for me and I
21 forgot to put it on, two of them.

22 The Camel Ultra Lights has holes.

23 This is a Virginia Slims Ultra Lights, which
24 has a dual ring of holes.

25 Winston Lights, Carlton.

1700

1 At present -- I will stop there.

2 Q. Okay. So all of these, quote-unquote, light
3 cigarettes, the various manufacturers have put this
4 additional set of holes in them to add in the fresh
5 air that comes in during the testing process; is that
6 correct?

7 A. Partially.

8 Q. In what way is it not correct?

9 A. Well, the Marlboro Regular also has a ring of
10 holes, so it's not just the light cigarettes. But the
11 difference between Marlboro and Marlboro Light, a
12 major difference is more holes on the Light.

13 Q. Okay. Now, that results in a lower tar
14 number from the FTC; correct?

15 A. Correct.

16 Q. But in the actual real world, when a smoker
17 smokes a cigarette, is the situation similar to a
18 smoking machine that smokes these cigarettes for
19 testing purposes?

20 A. No.
21 Q. And can you explain for us, Doctor, why that
22 is?
23 A. Yes.
24 THE WITNESS: And to what degree can I
25 explain --

1701

1 JUDGE RECHT: It's a broad question.
2 You can explain it, but the explanation is confined to
3 the question.

4 THE WITNESS: Okay.

5 BY MS. DURAND:

6 Q. Would you like the question repeated, Doctor?
7 A. No. I just want to be careful to -- I
8 apologize, I want to be careful to follow the right
9 procedure.

10 There are many differences in the way people
11 smoke cigarettes as compared to machines.

12 One of them is that you can deliberately or
13 accidentally cover the ventilation holes. Some of
14 them or a lot of them.

15 You can take larger puffs. One of the things
16 that we found in our early studies was that people
17 took larger and more frequent puffs than the machines
18 did. Remember, the machine takes a 35-milliliter puff
19 every minute and it's a two-second puff. We found
20 that people puffed oftentimes almost twice that fast.
21 So more puffs means more smoke.

22 If you take a larger puff over the same
23 amount of time, it's like blowing a fire. You can
24 blow the coals a little bit and they glow brighter.
25 You blow the coals really hard, and they really burn

1702

1 bright. And the same thing happens with the burning
2 coal inside of a cigarette.

3 So a stronger, faster puff can change the
4 chemistry of the smoke.

5 Q. Are there any other ways that a smoker can
6 change the manner in which a cigarette is smoked that
7 is different from the machine?

8 A. There are many other ways.

9 Q. Can you name a few of those?

10 A. I can. It may be easier to show them, but
11 they include smoking the cigarette further than the
12 machine smokes the cigarette. That seems obvious, but
13 the machine stops smoking out here, three millimeters
14 out from the paper overwrap. On some cigarettes that
15 leaves several more puffs of tobacco that you can
16 smoke.

17 Q. And is there anything else?

18 A. Those are some of the most important ways:
19 Bigger puffs, more puffs, covering the vent holes.

20 Q. So that in the real world, a smoker can
21 actually smoke a cigarette in a manner which exposes
22 that smoker to greater tar rates than what the FTC has
23 tested?

24 A. Yes.

25 Q. And so -- we have talked a little bit about

1703

1 tar here, Doctor. And I think is this a good time to
2 return to the stand or would you want to -- let's
3 maybe show this to the jury and return to the stand,
4 Doctor, and put the lights back on.

5 A. May I add one point to this, so the jury will
6 not be confused as to what this stuff is?

7 Q. Well, before we give it to the jury, you are
8 talking about the tobacco along the side the filters?

9 A. Yes.

10 Q. What have you put alongside the filters?

11 A. From each cigarette I took a little pinch of
12 the filler material, and if you look at it, you will
13 see that some of it looks kind of like shredded
14 confetti and some of this is what's called recon or
15 reconstituted tobacco sheet.

16 Some of it will look like little pieces of
17 leaves, which is what it is. They have been treated
18 in various ways.

19 Q. Okay.

20 MS. DURAND: Can we get the lights?

21 Your Honor, can I pass this to the
22 members of the jury so they can take a closer look at
23 the actual laminations?

24 JUDGE RECHT: Any objection?

25 MR. FURR: No objection.

1704

1 JUDGE RECHT: All right. They may be
2 circulated.

3 BY MS. DURAND:

4 Q. Now, Doctor, returning to what we have been
5 discussing, all of this discussion about the tar
6 levels and the testing of tar levels, why is the level
7 of tar important when analyzing a cigarette?

8 A. One of the fundamental observations about
9 smoking and disease is the dose/response
10 relationship. The more you smoke, the greater the
11 risk of disease.

12 Tar levels have been assumed for decades to
13 be the most important factor in cancer and many other
14 diseases. So the amount of tar you are taking in per
15 cigarette is important.

16 Q. And what exactly is tar?

17 A. Tar is this -- it's basically all of the
18 particulate matter. There is a technical definition
19 and I guess a more general one.

20 The technical is the Federal Trade
21 Commission's definition of tar, which is the total
22 particulate matter minus gases and a couple of other
23 substances. It's basically what you are left with on
24 the filter. It's the dark brown gooey looking stuff
25 if you see it or hold it.

1705

1 Q. And is that tar what's left over from the
2 cigarette itself or from the smoke in the cigarette?

3 A. It's from the smoke. There is no tar in a
4 cigarette --

5 Q. I see, Doctor.

6 A. -- before it is burned.

7 Q. Let's take a look. We have a chart that has
8 some of the additives and ingredients in a cigarette
9 and that might help the members of the jury to
10 understand the ingredients of a cigarette versus the
11 components of smoke.

12 JUDGE RECHT: Randy, can you switch that
13 off?

14 BY MS. DURAND:

15 Q. Now, Doctor, this is a chart that, as you

16 have seen, includes a variety of different elements
17 that are present both in a cigarette and in cigarette
18 smoke, and the jury has had a chance to see this
19 briefly in opening.

20 But one of the things that I'm interested in
21 getting you to describe for me is the difference
22 between the actual ingredients that exist in a
23 cigarette and the ingredients in that cigarette smoke
24 that creates the tar. What ingredients are in a
25 cigarette?

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1 A. The primary ingredients in a cigarette are
2 the paper wrapping, the filter in the vast majority of
3 cigarettes sold in the United States, and then the
4 tobacco filler material which generally includes coke,
5 chuck, tobacco leaves and also includes the shredded
6 reconstituted sheet material.

7 Q. And Doctor, what do you mean by shredded
8 reconstituted sheet material?

9 A. Reconstituted tobacco sheet, there are
10 different ways of making it, but one of the major ways
11 is very similar to the process of making paper.

12 You take the tobacco plant material, it's
13 dissolved, made into a slurry, you can put it on
14 moving belts and get essentially a brown paper that
15 you see in some of those laminations. That can then
16 be shredded up and used -- if it's shredded up, it is
17 used in a cigarette. It is also used in around half
18 of the lower cost cigars as the outer wrapper. The
19 brown wrapper is a reconstituted sheet material.

20 Q. So that's just added to the regular tobacco?

21 A. Yes.

22 Q. And is there anything else that is an
23 ingredient in that cigarette?

24 A. Well, when you make the reconstituted sheet,
25 that sheet loses a lot of the things that were in the

1707

1 original plant. It loses flavors, it loses a lot of
2 substances, and the most common term is tobacco
3 extract which can be sprayed back or added back into
4 the material to bring back flavor and other
5 characteristics.

6 And this center section of the chart called
7 additives is just a partial listing to give you a
8 sense of the wide range of things that can be used in
9 cigarette manufacture.

10 Q. Before we go on to those additives, can you
11 tell me a little bit more about the tobacco extract?

12 A. Well, it can be material that was liquified
13 and taken out and put back for any given cigarette
14 brand. I don't know the details of what it is.

15 Q. Now, so we talked about tobacco,
16 reconstituted tobacco, tobacco extract, and now there
17 are some of these additional additives -- you can blow
18 that up again -- that could be in a cigarette.

19 Why would alfalfa be in a cigarette?

20 A. A lot of -- this is I think the technical
21 term is hodgepodge. This is a list of a lot of
22 different things that can be used in the process. It
23 does not mean that all of them remain in the
24 cigarette.

25 And I'm sorry if I'm -- it's important to

1708

1 point out that not all of these things remain in a
2 cigarette, but things can be used to alter the flavor,
3 to produce the unique characteristics of a given
4 brand, and things like carbon dioxide and Freon might
5 be used in processing.

6 Q. I see, Doctor. Well, for example, why is
7 ascorbic acid used in either the process or the
8 cigarette itself?

9 A. For any specific item, with some of them,
10 there are reasons that have been published and
11 explained. Others enter what is sometimes called the
12 art of blending and making a product that has unique
13 characteristics.

14 So with -- so the answer is going to be
15 different with different ones. Would you like a
16 couple of examples?

17 Q. Give me an example.

18 A. One thing that can be done to expand the
19 tobacco and make it possible to make more cigarettes
20 with less tobacco is to expand it. Sometimes it's
21 called puffing it or puffing tobacco. You can use
22 carbon dioxide, Freon gas, you can use carbon dioxide
23 and ammonia, liquid ammonia solutions. And then you
24 freeze dry the material, and that material leaves but
25 it puffs up the tobacco.

1709

1 Now, the method you use may leave its imprint
2 on the tobacco. How you do it does make a
3 difference.

4 There are other things that might be added in
5 smaller amounts or larger amounts. One of the things
6 that I do not know is brand for brand which cigarettes
7 have which things. That's starting to change.

8 Q. So some things might be added just in the
9 process of creating it, creating the cigarette? Some
10 things might be added, as you said, as a flavorant?

11 A. Yes.

12 Q. In the list can you name one or two things
13 that could possibly be added as a flavorant?

14 A. Liquorice and cocoa. The tobacco industry is
15 one of the biggest consumers -- it's a large consumer
16 of cocoa.

17 Q. So there actually is chocolate in our
18 cigarettes?

19 A. I don't think what people would ordinarily
20 think of as chocolate, but material that is used to
21 make chocolate.

22 Q. Okay. And with respect to ammonia, why is
23 ammonia in cigarettes?

24 A. Ammonia can be used in this processing.
25 Ammonia can occur naturally in small amounts, it can

1710

1 also be used in the processing to break down the
2 tobacco. It can also be used as a way of helping the
3 tobacco release other substances.

4 In other words, there are a lot of these
5 things that don't have a simple, single reason. The
6 list of potential things is about six hundred.

7 Q. Okay. So it sounds like it can be a fairly
8 complex process in terms of the manufacturing and the
9 decision-making with respect to how to do that
10 manufacturing by the companies?

11 A. Yes.

12 Q. It's not just tobacco that comes out of the
13 ground and gets wrapped in paper?

14 A. It's far from it.

15 Q. Okay. Now, all of these ingredients, if they
16 are present in a cigarette before it's smoked, what
17 happens to those components and the ingredients when a
18 cigarette is actually lit up?

19 A. The cigarette in its simplest form may be
20 comprised of a few basic elements: Leaves, paper,
21 filter. As you can see, each of those elements may
22 have additional things in them.

23 Some of these things are in the paper. When
24 they are burned together, the cigarette is working
25 like a little miniature chemistry factory, and it is

1711

1 burning at very high temperature in a oxygen-starved
2 environment, and it produces a lot of things that
3 weren't in the cigarette. And that's this list of
4 things on the right side of the screen listed under
5 cigarette smoke.

6 So we start out with a couple of things, we
7 add some more things to it, and then burn it. And all
8 of the sudden you produce more than four thousand
9 different chemicals, things that weren't there before.

10 Q. And of the things that are components of
11 cigarette smoke, clearly in the chart here we talk
12 about them as being carcinogens. Are there any things
13 that remain -- well, strike that.

14 We talk about them being carcinogens. Can
15 you go through the list there and pick out an example,
16 Doctor, of any of those elements, whether in the
17 organic compounds or inorganic compounds or in the
18 carcinogens, that remain in the tar that we were
19 talking about earlier?

20 A. Yes. All of these things on the right side
21 are things that are extracted from the -- this gluey,
22 gooey tar stuff. Some of it may have been actually in
23 the tobacco plant that were taken up from the soil,
24 and that might include, for example, residuals of lead
25 from the air that's leached into the soil, arsenic, a

1712

1 cyanide which is something you can measure in
2 smokers.

3 There are things that are produced. For
4 example, glycerol is used, and glycerin products when
5 burned can form products such as acrolein.

6 So some of these things are modified and
7 serve as building blocks for new things that did not
8 previously exist and can only be produced under
9 these -- this elaborate little chemistry factory.

10 And some of the things are things that can be
11 taken up from the soil, some of the things -- some of
12 the gases, like carbon monoxide gas, is something that
13 is produced when you light a match in small amounts,
14 but are produced in even greater amounts with a
15 charcoal fire where it is oxygen-starved.

16 Q. So Doctor, any number of these compounds in
17 the cigarette smoke end up being found in this tarry
18 substance that was tested to end up with the tar
19 numbers that we have been talking about so much today?

20 A. Yes.

21 Q. Now, Doctor, did you bring a demonstrative
22 aid today that might assist the jury in understanding

23 what this tar is that is being tested or something
24 that is similar to what's being tested by the Federal
25 Trade Commission?

1713

1 A. Yes.

2 Q. Would you --

3 MS. DURAND: Can I ask him to step down
4 and do the demonstration, Your Honor?

5 JUDGE RECHT: All right, fine.

6 MR. FURR: Excuse me, Your Honor. If
7 Ms. Durand is finished with this, can we mark it for
8 identification so I can use it?

9 JUDGE RECHT: Sure can.

10 Again, it's still a demonstrative aid.
11 Just because it's being marked does not mean it is
12 going to be admitted.

13 How do you want it marked?

14 MR. FURR: Defendant's Exhibit 1 for
15 identification, I guess.

16 JUDGE RECHT: Let's call it Defendant's
17 Exhibit Demonstrative No. 1.

18 (Defendant's Exhibit Demonstrative No. 1
19 is marked for identification.)

20 BY MS. DURAND:

21 Q. Now, Doctor, before we do the little
22 demonstration, what exactly is this contraption that
23 you have brought with you today?

24 A. This is officially sold and advertised as
25 Smoky Sue, and it's a little device that is used for

1714

1 junior high school, high school demonstrations. It's
2 an educational aid from a company called
3 Health EdCo -- I think it's Health, one word, and
4 E-d-C-o -- I believe is their name on the brand of the
5 device.

6 Q. So you said this is used in schools?

7 A. Yes.

8 Q. And what exactly does this demonstrate?

9 A. It shows the smoking process and can be used
10 to trap tar mixture in a tubing.

11 Q. Okay. Would you mind stepping down and doing
12 a demonstration for the ladies and gentlemen?

13 Now, in an effort not to create a hostile
14 environment for anyone who might not be a smoker, we
15 are only going to do --

16 MR. FURR: Objection, Your Honor.

17 JUDGE RECHT: All right. Let's just --
18 I appreciate your concern, but I think the gratuitous
19 remark is not called for.

20 MS. DURAND: I apologize, Your Honor.

21 JUDGE RECHT: The jury will be
22 instructed to disregard the comment.

23 MS. DURAND: We are only going to do two
24 puffs off of the cigarette; correct, Doctor?

25 THE WITNESS: Correct.

1715

1 MS. DURAND: Okay.

2 THE WITNESS: This is the device, and I
3 want to use it to illustrate a couple of simple points
4 about cigarette smoking and tar production which go
5 hand in hand.

6 The first is the port where you put the
7 cigarette. And this is not unlike the FTC system.

8 You squeeze the cigarette into it. It does not cover
9 the ventilation holes.

10 Now, Your Honor, it's important --
11 JUDGE RECHT: Do you all want to come --
12 are you sure? Because we certainly don't want to
13 deprive you of the ability to see this.

14 Okay, go ahead.

15 THE WITNESS: My request was that we
16 only do two puffs? Because --

17 JUDGE RECHT: If that's what it was,
18 fine.

19 THE WITNESS: Okay.

20 THE WITNESS: Now, watch the tip.

21 Now, I used her to smoke a couple of
22 cigarettes last night outside and then in a smoking
23 lounge.

24 This brown material is the material --
25 not all the material that was produced, but when you

1716

1 hear the word tar, this is what it looks like. And
2 this is what was trapped from a couple of cigarettes.

3 BY MS. DURAND:

4 Q. And Doctor, was that the same type of
5 material that would have been trapped in the FTC
6 testing study?

7 A. Yes, it is.

8 Q. So that same type of material would be
9 subjected to a test and would result in a tar level
10 for the particular cigarette?

11 A. Yes.

12 Q. Okay. Thank you, Doctor.

13 Now, Doctor, we have talked a lot about the
14 ingredients and what constitutes cigarettes and what
15 happens with respect to this whole tar testing
16 situation.

17 Can you come back down here -- I'm sorry, I
18 made you go back up to the witness stand -- come back
19 down here and show us in greater detail precisely what
20 makes up a cigarette on the ELMO there?

21 A. Sure.

22 Q. And in the process, I'm going to ask you to
23 dissect both a Marlboro and a Marlboro Light and some
24 additional ones.

25 A. Okay. This is the Marlboro cigarette. The

1717

1 Marlboro Light has the gold lettering on it. Let me
2 show you a few design features.

3 Q. Before you get started, is it possible to see
4 the vent holes on the cigarettes that are not taken
5 apart as we saw on the lamination?

6 A. It's very difficult. I can't see them with
7 this light, but when I cut the paper off and then if
8 you hold it to a light as is possible with the
9 laminations that I passed around, if you hold it up to
10 a bright light, then you can see the holes.

11 Q. So a smoker just in the process of smoking a
12 cigarette most likely would not be able to see the
13 perforations or the vent holes?

14 MR. FURR: Objection. Calls for
15 speculation.

16 JUDGE RECHT: All right. Objection will
17 be sustained.

18 BY MS. DURAND:

19 Q. As we look here at this particular set of
20 cigarettes, it's not possible as you hold that
21 cigarette to see the vent holes?

22 A. I cannot easily see the holes on this
23 cigarette. On some cigarette brands I can see the
24 holes more easily.

25 Q. But as we look at these cigarettes right

1718

1 here, you can't?

2 A. I can't easily, but I know how to find them
3 so that I will be able to see them.

4 Q. Okay.

5 Now, you are going to take that set of
6 cigarettes and dissect them and show us the specific
7 elements of the cigarette. Can you just proceed to do
8 that, Doctor?

9 A. Sure. The first thing is the FTC machine
10 stops smoking three millimeters out from the
11 overwrap. This is called the overwrap.

12 Q. Before you go any farther, I think it's
13 probably difficult for the jury to see that.

14 A. Oh, I'm sorry.

15 I'm going to cut this right here. This may
16 look to you from the outside -- or this looks to me
17 from the outside like this is all the filter, but
18 actually there is tobacco down there. And this is the
19 overwrap which is different lengths for different
20 cigarettes.

21 Most cigarettes have an overwrap. And the
22 amount of tobacco that may be under the overwrap in
23 addition to the three millimeters beyond the overwrap
24 might be the equivalent of anywhere from one to three
25 to four puffs, depending on how you are puffing the

1719

1 cigarette.

2 Q. Doctor, what's the purpose of having an
3 overwrap?

4 A. The simple purpose is to attach the filter to
5 the cigarette, and it varies widely in different
6 brands, as I can show you, and with some brands
7 appears to be more than you physically need to attach,
8 and can serve the additional purpose of keeping more
9 tobacco that would not be burned by the smoking
10 machine.

11 MR. FURR: Objection, Your Honor. This
12 is the area where we got into before that I was
13 talking about.

14 JUDGE RECHT: About what?

15 MR. FURR: About ascribing intent to
16 others.

17 JUDGE RECHT: All right. Objection will
18 be sustained. The jury will be instructed to
19 disregard the last response.

20 BY MS. DURAND:

21 Q. Okay. Is there any particular purpose that
22 could possibly be -- well, strike that.

23 Let's just go on. In addition to the
24 overwrap, there is a filter. What is the filter in
25 this particular cigarette?

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1 A. On most modern cigarettes, the filter is a
2 material called cellulose acetate, cellulose acetate
3 tow. It's very fine strands of material that can be

4 made by pumping the foundation material through the
5 equivalent of a sprayer and getting these very, very
6 fine fibers which can then be used to make the filter
7 material -- it shows up better on the blue -- to trap
8 substances in the smoke.

9 Q. And is that the only type of filter that is
10 on the market today?

11 A. Cellulose acetate is the major material used
12 in filters. You can also put other things in the
13 filter like charcoal and, for example, one brand
14 advertises a multistage filter that --

15 Q. And we will have an opportunity to examine
16 some filters a little bit later on, won't we, Doctor?

17 A. Whatever -- yeah, I will be happy to show
18 them.

19 Q. With respect to that small amount of tobacco
20 there that came out of the cigarette as you cut into
21 it, can you see anything in there that tells you
22 whether it consists of reconstituted tobacco or
23 anything else about that tobacco in particular?

24 A. You can't always tell simply by looking at
25 the material and being certain as I am doing. But in

1721

1 general the material that looks more like shredded --
2 more like a confetti-like material is reconstituted
3 tobacco sheet. Sometimes you can see material that is
4 a tiny little stem, and if you can tell, it's a round
5 little stem. So there are different materials that
6 are in there.

7 Q. So you could actually differentiate between
8 the actual tobacco and the reconstituted tobacco based
9 on the shape of it?

10 A. Crudely. You can't always be right.

11 Q. But can you tell there is reconstituted
12 tobacco in this particular cigarette based on what you
13 are looking at, Doctor?

14 A. This appears to have it. And one of the
15 things that is known in general is that a typical
16 American cigarette contains twenty to thirty percent
17 reconstituted tobacco. Having said that, there is a
18 wide range of differences.

19 Q. Now, the tobacco that's in this particular
20 cigarette that you have cut into, is that tobacco
21 distributed through the cigarette in an even manner,
22 or is there something different about the tobacco
23 that's closest to the filter versus the tobacco that's
24 closest to the tip?

25 A. To the best of my knowledge, it's evenly

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1 distributed.

2 Q. By looking at that, is there anything you can
3 tell about whether there is any particular additional
4 additive or ingredient in that cigarette that you have
5 cut into?

6 A. Not in the tobacco itself. There is the
7 tobacco paper which has ingredients, but you can't see
8 them with your eye.

9 Q. Well, let's talk about that, because you
10 haven't had an opportunity to discuss the paper that
11 surrounds the cigarette. Can you explain what is in
12 that paper and what makes that paper very important to
13 the cigarette design and engineering process?

14 A. Sure. To the simplest extent, the paper is

15 holding the tobacco. But the paper is doing more than
16 that in the modern cigarette. In the modern
17 cigarette, the paper has little rings that you can
18 see, and if I get this -- you can see them on the
19 lamination.

20 MR. FURR: Excuse me,
21 Doctor Henningfield.

22 Can I approach for a moment?
23 (Whereupon, the following matter was
24 heard at benchside outside of the hearing of the
25 jury.)

1723

1 MR. FURR: Your Honor may recall that
2 during voir dire, I specifically asked
3 Doctor Henningfield some questions about his expertise
4 with respect to paper, and he said that he
5 understood -- he could address issues such as the
6 ventilation holes in the paper. Beyond that he said
7 there are many things about the paper that are outside
8 my expertise.

9 The only thing that he said in response
10 to my question is he could address ventilation holes,
11 I think. This was a very disclaimer by himself what
12 was outside his area of expertise.

13 MS. DURAND: If I may, Your Honor, he
14 said that was one of the areas within his expertise
15 with regard to the paper. He did not say that that
16 was the only area within his expertise with respect to
17 the paper.

18 JUDGE RECHT: All right, this is what we
19 are going to do. To the extent that that's an
20 objection, the objection will be overruled. I will
21 permit you to cross-examine on that whole area, and
22 that goes to the weight and not to the admissibility.

23 MR. FURR: Okay.
24 (In open court:)

25 BY MS. DURAND:

1724

1 Q. Doctor, as we were discussing, you were
2 talking about the paper that was specifically designed
3 to go around the cigarette. Could you please continue
4 with the answer to my previous question?

5 A. Sure. In addition to containing the tobacco,
6 the paper can affect how the cigarette is lit and more
7 specifically how it keeps burning.

8 And so it will have additives in the paper
9 that are a burn accelerant. A burn accelerant is
10 something like a citrate type of compound that is in
11 there to make it burn without going out. You can
12 adjust the burning rate with more burn accelerant so
13 it would burn faster.

14 There are other substances in the paper that
15 have other effects on the smoking process.

16 Q. Is there anything else about the paper that
17 is unique to a cigarette?

18 A. Well, some of these substances, for example,
19 are called ash conditioners. It might be something
20 that simply gives the ash a like gray appearance. In
21 other words, there are substances that keep it
22 operating, that keep it burning.

23 There are substances that can alter what the
24 smoke looks like that comes from the cigarette. And
25 what the ash looks like. And together it is part of

1 the reason that the cigarette, modern cigarette does
2 not self-extinguish and burns rather neatly down its
3 rod and has a light gray ash material.

4 Q. Can you explain a little bit more about the
5 self-extinguishing aspect of the modern cigarette?
6 Does that mean that prior to this type of paper being
7 used in the cigarette, it just would extinguish as you
8 were smoking it?

9 A. Without the burn accelerant, it's easy for a
10 cigarette to self-extinguish. And for example, a
11 roll-your-own cigarette that has paper that is
12 conventional and does not have the burn accelerant, it
13 will often go out on its own unless you are puffing it
14 frequently enough to keep the little coal hot.

15 Q. So that's another aspect of the design that's
16 changed over the years?

17 A. Yes. And it's an aspect of design that can
18 be used to produce a given FTC rating.

19 Q. And how is that, Doctor?

20 A. Part of the reason I wanted to show you the
21 Smoky Sue is you see that when the puffing occurs, the
22 cigarette burns hot and the coal really burns more
23 brightly and it's much hotter. Within one or two
24 seconds, the temperature can go up several hundred
25 degrees very quickly.

1 In between puffs a different type of burning
2 is done, and this is generally referred to as
3 smoldering. It is just smoldering away. And in the
4 Federal Trade Commission machine film that we saw, you
5 saw smoke going up that would have just gone up and
6 out the building through the ventilation system, that
7 was smoke during the smoldering.

8 Well, if you can make more tobacco burn in
9 between puffs with the burn accelerant, more smoke
10 goes out the building and is not trapped by the
11 Cambridge filter.

12 Q. Okay. Doctor, now, with respect to the
13 cigarettes that you have on the ELMO there, you have,
14 as I stated before, a Marlboro and a Marlboro Light.
15 Can you also move on to the next cigarette, which I
16 think is a Kool, or is it a Benson & Hedges that you
17 are going to dissect?

18 A. How about -- sure, let's just -- here is a
19 Classic Kool Menthol Filter King.

20 Q. Now, you mention the word menthol. What is
21 the difference between a regular cigarette and a
22 menthol?

23 A. Menthol is a flavoring. It's a material that
24 can be added to the cigarette to give it the kind of
25 menthol flavor that people are probably familiar with

1 from other products.

2 Q. Is that one of those six hundred possible
3 additives that we discussed, some of which were up on
4 the chart we looked at earlier?

5 A. Yes.

6 Q. And menthol actually -- Doctor, can you
7 change it around so that it's possible --

8 A. Thank you.

9 Q. In the menthol cigarette, how does this
10 cigarette differ from the other ones you dissected for

11 us today?

12 A. First, I split this open. This is where the
13 FTC smoking machine stops, about here, here is the
14 overwrap, and so here is the material that is not
15 smoked by the machine but can be by a smoker.

16 The menthol alters the flavor and the smell
17 and may alter the chemistry of the smoke in other ways
18 that is being investigated.

19 Q. And is the filter any different with respect
20 to a menthol cigarette?

21 A. Not that I am aware of. And you said
22 menthol, but many different brands have menthol, so
23 all brands that contain menthol are not necessarily
24 the same.

25 Q. So the menthol is added not to the filter,

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1 but to the tobacco itself? I'm just trying to
2 clarify.

3 A. I believe at this point the flavoring is
4 added to the tobacco itself. At different points in
5 time flavors and other materials have been added to
6 the filters. At this point for any given brand, I do
7 not know the degree to which it is in the filter or
8 the tobacco.

9 Q. Now, but the primary difference between what
10 we saw with the menthol cigarette and the first
11 Marlboro cigarettes that we looked at were the
12 location of the overwrap, I take it?

13 A. Actually there was not a large difference.
14 The point was this cigarette employed some similar
15 design techniques that leave tobacco that is unburned
16 by the standard FTC smoking machine test.

17 Q. Okay. Now, you mentioned before, Doctor,
18 that there are differences in the filters that are in
19 the different cigarettes. But in addition to that,
20 aren't there -- well, let me strike that.

21 There are differences in the filters and
22 there are also differences once a cigarette is smoked,
23 I take it, in the way a filter looks. Am I correct in
24 that assumption?

25 A. Yes.

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1 Q. And can you explain to me why that is?

2 A. Well, I have talked about the Cambridge
3 filter which in the smoking machine traps the material
4 and traps the smoke. The last filter before the smoke
5 goes into the machine is the cigarette filter, and so
6 all of the smoke that got into the machine first had
7 to go through that filter.

8 And so what that means is that the more smoke
9 that goes through the filter, the darker the filter
10 is, and you can see the stain and you can see the
11 stain pattern that may relate to how it was smoked.

12 Q. Okay. And do we have any examples of how the
13 stain pattern or the smoking pattern can vary among
14 cigarettes?

15 A. Yes. I have two packages of cigarette butts.

16 Q. And can we take a look at those, Doctor?

17 A. Sure.

18 Q. Where do these particular butts come from?

19 A. These are butts that I have primarily gotten
20 from ashtrays, a couple at the hotel and most of these
21 from in front of the courtroom this morning at

22 different times.

23 Q. And so you were able to select these butts
24 right in the general vicinity. And what is it that
25 the butts demonstrate, just briefly?

1730

1 A. Well, what I wanted to illustrate with this
2 is a couple of things. That that the butt lengths are
3 different. There is a lot of variation. Some are
4 smoked down and it appears that they were smoked down
5 to a length and put out. Let me change this focus.

6 Would it be permissible to point some things
7 out and let the jury look at?

8 Q. Well, let me do it this way, Doctor. Clearly
9 we have got quite a few butts there. Could you pull
10 out maybe three or four as an example that can help to
11 show us the difference that -- the different manner in
12 which smokers will smoke the cigarettes?

13 A. Sure. Now, if the cigarette has not been
14 jammed into the ashtray and pretty obviously bent, you
15 don't know if it was smoked down to the end or if it
16 just kept burning.

17 Q. Before we start, let me ask you this,
18 Doctor. Why did you pick out this particular butt as
19 an example?

20 A. I just grabbed cigarette butts that were in
21 the ashtray.

22 Q. Okay.

23 A. I'm not sure I grabbed every single one.

24 Q. And I take it you are cutting off the very
25 end of the filter. And what is that going to indicate

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1 to you?

2 A. Well, by itself it doesn't indicate much
3 of -- necessarily much of anything. But in comparison
4 to others, you will see some differences.

5 Q. I see, Doctor, you cut off the end of these
6 three -- well, I guess you are getting out another.
7 Excuse me.

8 Is that a good representative sample of what
9 you picked out?

10 A. A good mixture.

11 Q. Before we get started, can you tell from
12 those butts what the brands are that you have there?

13 A. Yes. The brands of all of these have the
14 brand name printed on the cigarette.

15 Q. And what do we have there?

16 A. I have a Malibu; a type of Marlboro; and
17 green Benson & Hedges, I believe it's menthol; a
18 Winston, I don't know which of the Winstons; and one
19 that -- oh, a Camel.

20 Q. Okay. And you have cut the end of the filter
21 off of all of these butts?

22 A. Yes.

23 Q. And what did the ends of those filters
24 indicate to you, Doctor?

25 A. Well, the darker the stain, the more tar

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1 passed through the end of the filter, so it's darker.
2 When the stain is surrounded by white, that's
3 something that occurs when fresh air is coming through
4 the cigarette.

5 So with the obvious limitation that I don't
6 know who was smoking these and I did not watch the

7 people smoke, these look like patterns that my
8 colleagues at Johns Hopkins and others have studied
9 that show that there are different stain patterns that
10 are evident to the naked eye, if you will, when you
11 look at cigarette butts.

12 Q. Now, what did these particular stain patterns
13 tell you about the manner in which these cigarettes
14 were smoked?

15 A. Well, for example, this one is darker on one
16 side, light on the other, which is an indication that
17 the ventilation holes were at least partially blocked
18 on this side where it's dark and fresh air was coming
19 in on this side.

20 Q. And what about the cigarette next to that?

21 A. This cigarette, it is very uniformly
22 stained. Most of these others the stain is more
23 uniform, which suggests that there was a higher degree
24 of ventilation hole blocking.

25 Now, the stain also -- these were collected

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1 this morning, and the stain can migrate, it can go
2 from the center to the outside. So over time they
3 will become more stained. But the most valid way to
4 do the test, if you will, is right after the cigarette
5 was smoked.

6 Q. Well, since they were collected either late
7 last night or early this morning, would that have been
8 enough time for the stain to have migrated?

9 A. It is enough time for it to begin migrating.
10 And again, this is not a scientific study. This
11 illustrates something that I think allows you to see
12 tar and see how it can be different.

13 Q. And that stain that we are talking about is
14 tar, isn't it?

15 A. Yes.

16 Q. And as you said, does this representative
17 sample of just a couple of ashtrays in the area
18 illustrate as I think you mentioned before the
19 research that your colleagues have done?

20 A. Yes.

21 Q. And in what way does it illustrate it?

22 A. Well, one of the things that was done by Jim
23 Zachny and others in my program at Johns Hopkins was
24 to have people independently look at the stains after
25 they were smoked to different amounts, different

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1 amounts of puffs were taken by either a machine or
2 people, and one of the things that they found was the
3 greater number of puffs, the darker the stain. If you
4 block the holes on one side, the stain moved to that
5 side. And it was a useful way in estimating how much
6 tar you had taken, not in milligrams obviously, but
7 estimating you would have taken in a lot of tar if it
8 was a dark stain, that you would block the holes if it
9 was a dark stain completely covering the butt, and if
10 the butt had a relatively small dark stain right in
11 the middle and was surrounded by white filter
12 material, that meant that the holes -- that's what
13 happened when the holes were not covered. And that
14 would be closer to what happens with the FTC smoking
15 machine.

16 Q. So in the smoking machine, the filters would
17 not have looked like this; right?

18 A. Most of these would not look like this
19 because at least most of these that I have collected
20 are ventilated, and in the smoking machine with a
21 smaller number of puffs --

22 Q. So smokers who leave a butt that looks like
23 this are not getting the same levels of tar that a
24 smoking machine -- or that the FTC is reporting for
25 the various cigarettes; is that a correct conclusion?

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1 A. Right.

2 Q. Are they getting more or less?

3 A. Well, if it's darker, it's more. And it's
4 possible to look at, as I did with the second sample,
5 different number of puffs and look at the stain
6 intensity or how dark the stain is.

7 Q. So if it's darker it's more, but I suppose if
8 it's lighter, it could be less?

9 A. Yes.

10 Q. And the whole point of this is to illustrate
11 I take it, Doctor, from your testimony that we
12 can't -- that the individual -- well, strike that.

13 The whole point is that people are not
14 necessarily getting the same levels of tar that are
15 being reported by the FTC?

16 A. Correct. It's not an EPA gas reading.

17 Q. Thank you, Doctor.

18 MS. DURAND: Doctor, I think it's
19 probably a good time to return to the witness stand,
20 and we can get the lights up. That would be good.

21 JUDGE RECHT: All right.

22 MS. DURAND: If the Court might indulge
23 me a moment?

24 JUDGE RECHT: All right.

25 MS. DURAND: Doctor Henningfield, I

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1 would like to thank you for your testimony here today,
2 and I have no further questions for you at this
3 moment.

4 Thank you ladies and gentlemen.

5 THE WITNESS: You are welcome.

6 JUDGE RECHT: I suspect there is going
7 to be some cross-examination. Is that a fair
8 assumption?

9 MR. FURR: Yes, sir, if I am permitted
10 to do so?

11 JUDGE RECHT: Yes, indeed. And it will
12 be longer than five minutes?

13 MR. FURR: Yes, sir.

14 JUDGE RECHT: Well, let's not -- again,
15 can you return tomorrow morning, Doctor?

16 THE WITNESS: Yes, I can.

17 JUDGE RECHT: Let's wrap it up for
18 today.

19 We will reconvene at 8:30 tomorrow
20 morning sharp. We will be on time, I promise you.

21 Please don't discuss the case among
22 yourselves, nor permit anyone to discuss it with you.
23 Don't read about it, watch it, look at it, talk about
24 it. Get everything out of your mind, everything out
25 of your mind about this case completely.

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1 As a convenience for you, we have a
2 handy-dandy calendar. This is right now what we are

3 expecting. Everything that's in the highlighted
4 portion are the trial days, maybe subject to some
5 change, but I think you should be able to -- and
6 Jerry, why don't you just give these to each juror as
7 they are -- it's just a handy little guide for you.

8 Take your notepads, put them back in the
9 jury room, we will lock that so everything will be
10 secure. Thank you. See you tomorrow morning.

11 We have got stuff to do so don't leave.
12 (Whereupon, the jury left the room.)
13 * * *

14 (In open court without a jury present.)
15 JUDGE RECHT: All right, be seated.

16 I want to discuss obviously the exhibits
17 for tomorrow or any objections that we can get out of
18 the way.

19 One housekeeping matter, and I -- just
20 out of an abundance of caution, what we have up here
21 generally is our stuff. Nobody should come back here
22 at all where the clerk's -- it just would be better
23 not to do it.

24 So if you need to get anything behind
25 here at all, let us know, we will get it for you. But

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1 don't do it. I guess that's about the -- all right.

2 Now, do you all have -- are we ready to
3 talk about the exhibits for tomorrow?

4 What are you going to do tomorrow? What
5 do we have to look forward to?

6 MR. BAKER: Well, at least I think I
7 have discussed with defense counsel, and we would like
8 to discuss at least some of the documents in Group 4
9 this evening, if we could.

10 I believe it starts on page eight and
11 carries over to page nine about halfway through ending
12 with 11336.

13 JUDGE RECHT: We are talking about
14 defendants' objection to plaintiffs' January 11th
15 trial exhibits?

16 MR. BAKER: We are still on January
17 10th, Your Honor.

18 JUDGE RECHT: We are still on January
19 10th?

20 MR. FURR: Your Honor, do we all need to
21 stay for the exhibit discussion?

22 JUDGE RECHT: You don't have to, not at
23 all. Just those that are going to talk about it. If
24 you want to go, you can go.

25 MR. FURR: Thank you.

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1 MR. BAKER: Just one more item of
2 scheduling. I discussed for defense counsel for
3 Reynolds, we would like to discuss the objections to
4 the Doctor Frank Colby deposition tomorrow morning at
5 8:00 a.m. if it pleases the Court. I believe you have
6 received papers from both sides on that.

7 JUDGE RECHT: I sure did.

8 You want to do it when? Tomorrow
9 morning? You don't want to do it now?

10 MS. FORBES: I understand there is a
11 videotape. If we could do it tomorrow morning, we
12 could be pretty efficient about it.

13 JUDGE RECHT: I would be happy to do it

14 at 8:00.

15 I do want to start at 8:30 with the
16 jury, though. So if we are not done, we are going
17 to -- before we take Colby, we certainly will do it,
18 but let's at least keep that promise tomorrow morning
19 and, listen, it's to everybody's benefit we do that.

20 And so do you want to do it tomorrow
21 morning? I don't want to do it any earlier than 8:00,
22 mainly because the court reporter has a hard time
23 getting here. So we will do it at 8:00 tomorrow
24 morning will be fine, get as much in as we can

25 MS. FORBES: Your Honor, I'm not sure,

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1 but at least on some of the discussions that we had
2 with Mr. Baker, based on some of your rulings on the
3 first publication set, it's my sense we could
4 substantially cut down what needs to be objected to.

5 JUDGE RECHT: You are singing my song.
6 That was the whole idea.

7 No, that really was the idea, and then
8 you can have -- as long as your objections are
9 properly preserved so that your record is protected,
10 that's all I really want you to do.

11 I think you get a sense of generally how
12 I'm looking at some of these things. That doesn't
13 mean that that's going to be the same for everything,
14 and if you have any questions on one, certainly we
15 will take them up. I don't mean to do it in a
16 wholesale fashion such as that.

17 MS. FORBES: What I might suggest, given
18 we had those rulings midday today and I don't think
19 any of us had a chance to see how that affects these
20 next sets, maybe it would make the job a lot
21 quicker -- Fred, if that's okay with you -- for you
22 dropping out some of these and as well have a short
23 list.

24 MR. BAKER: Or alternative -- may I
25 speak directly to counsel?

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1 JUDGE RECHT: On this issue, let's go
2 ahead, anything that's going to speed this up, that's
3 fine. Let's go ahead. It's off the record.

4 (Informal discussion held off the
5 record.)

6 MR. SEGAL: There was some demonstrative
7 work done today, and some of it is cigarette butts and
8 ashes and the like and a dirty pad. Now, obviously
9 the packages, the things that were shown to the
10 jury -- what did he call them, Mylar?

11 MS. DURAND: Laminates.

12 MR. SEGAL: Laminates, obviously those
13 need to remain in the courtroom, but obviously as far
14 as the dirty stuff, we would like to throw that away,
15 unless Mr. Furr feels it is material to his cross-
16 examination?

17 JUDGE RECHT: Just keep it intact right
18 now

19 MR. KLEIN: We would like to keep it
20 intact.

21 MR. SEGAL: Okay.

22 JUDGE RECHT: As a matter of fact, we
23 probably --

24 MS. FORBES: Actually wouldn't it make

25 sense to go ahead and mark it as a demonstrative

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1 number?

2 JUDGE RECHT: We will put a little note
3 on it to the cleaning people do not touch. They do
4 that generally anyhow, but this would be the one time
5 that they may decide to do it.

6 All right. Now, is there anything else
7 anybody wants to put on the record?

8 MR. BAKER: Your Honor, just a moment.

9 There are I believe a few depo
10 designations -- and I'm not asking to discuss them
11 this evening, but there is about five or six where we
12 asked simply to be heard and we gave you highlighted
13 copies with yellow for the --

14 JUDGE RECHT: Do you want to just tic
15 those off for me? I think I know which ones you are
16 talking about.

17 MR. BAKER: I have to look real quick.
18 I believe, Your Honor, it would be

19 Glenn, G-l-e-n-n, Heimann, H-e-i-m-a-n-n.

20 JUDGE RECHT: Got it.

21 MR. BAKER: I believe it's Kornegay,
22 K-o-r-n-e-g-a-y.

23 JUDGE RECHT: Got it.

24 MR. BAKER: Horrigan, H-o-r-r-i-g-a-n.

25 JUDGE RECHT: Got it.

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1 MR. BAKER: I believe those are the ones
2 we designated, and we asked to be heard at Your
3 Honor's convenience.

4 JUDGE RECHT: Are these just going to be
5 introduced at some point during the trial, is that
6 it?

7 MR. BAKER: Sooner perhaps rather than
8 later.

9 JUDGE RECHT: All right, sure. We can
10 do it sometime tomorrow if you want.

11 All right. Work on these exhibits.

12 MR. THOMAS: Your Honor, we are prepared
13 to go forward with any of the exhibits that Mr. Baker
14 would like to go through. If we can do it this
15 evening, we certainly can.

16 JUDGE RECHT: What happened to this new
17 spirit of cooperation?

18 MR. THOMAS: I know we have a lot of
19 exhibits we are going to be able to work out and some
20 we are not going to be able to work out, and the first
21 one we are not going to be able to work out. We can
22 do it this evening, we are here, or if you want to
23 wait until tomorrow?

24 JUDGE RECHT: If you already know there
25 is one you can't.

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1 Let me -- let's go off the record and
2 let's get it set up.

3 (Informal discussion held off the
4 record.)

5 JUDGE RECHT: We are talking about
6 Plaintiffs' Proffered Exhibit 11336. And hold on one
7 second. What page is it on? Is that in Group 1.

8 MR. BAKER: That would be actually in
9 Group 4 on page nine in the middle.

10 JUDGE RECHT: All right. The objections
11 are relevance.

12 MR. BAKER: I guess if we could start --
13 JUDGE RECHT: Danger of unfair
14 prejudice. Is that the one?

15 MR. BAKER: Yes

16 MR. THOMAS: Let me tell you a little
17 bit about it, if I can. It's a little different than
18 other things you are going to hear about.

19 Death in the West is a transcript of a
20 videotape of an interview conducted back in 1976 by
21 British Television, and it was a series of interviews
22 that British courts ultimately found were conducted
23 fraudulently of Philip Morris employees.

24 The interviews were conducted under
25 false pretenses. The executives at Philip Morris were

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1 drawn in and interviewed on one idea for the program,
2 and the program was produced and shown in England for
3 something else altogether.

4 Philip Morris sued the broadcasting
5 company in England, prevailed, and the remedy ruled by
6 the British Court, it was not to be shown again, all
7 tapes were to be returned to Philip Morris so it
8 couldn't be disseminated again.

9 Now, the transcripts have been supplied
10 to the Court. It was the subject of a motion in
11 limine that was set for October 5 or 6. It was
12 deferred until now.

13 JUDGE RECHT: Fine.

14 MR. THOMAS: Just to set the stage on
15 that.

16 JUDGE RECHT: The reason for it is you
17 feel the ruling of the British Court precludes its use
18 here?

19 MR. THOMAS: That's certainly one, Your
20 Honor, under principles of comity, that we need to
21 defer to the British courts, and if they upheld that
22 it was fraudulently obtained, needed to be returned
23 and all copies returned, under the principles of
24 comity and the Starcher case, which the Court
25 recognizes those principles, we should keep those out.

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1 JUDGE RECHT: Has any other court let it
2 in?

3 MR. THOMAS: Yes, and courts have kept
4 it out.

5 JUDGE RECHT: I want to get to that
6 too. But under what theory did they let it in, that
7 they do not give -- it's not a question of full faith
8 and credit, it's a question of comity based on comity
9 alone or is there something else?

10 MR. THOMAS: The Whitely case in
11 California it was kept out on the basis of comity.

12 JUDGE RECHT: Okay. But those that let
13 it in said we are not going to recognize comity. What
14 else, what other justification was there that was
15 found by another court, and did any court of the
16 highest jurisdiction in the state affirm that ruling?
17 Do we have any decisions on it at all by the highest
18 court in the state?

19 MR. THOMAS: If there is, Your Honor, I
20 don't know that.

21 The point of the matter is -- there are
22 two points. And the comity issue and the British
23 court's findings are very important. Because the
24 out-of-court statement offered to prove the truth and
25 the fraud issue that the British court found in order

1747

1 to return it all shows it's not the kind of hearsay
2 you can find truthworthiness in. There were
3 contentions that the interviews were spliced, that the
4 questions were loaded, you know, it just wasn't a fair
5 fight.

6 JUDGE RECHT: I appreciate that. Is
7 there anything else other than the comity and on the
8 basis that it was a fraudulently-obtained document?

9 The only thing that concerns me, and I
10 don't know, is that the laws in the United Kingdom
11 relating to these things may be substantially
12 different. I know they are on defamation, for
13 example. It's a totally different way of looking at
14 things.

15 But I don't know if it's here, if there
16 is a reason to give comity and to -- by the way, it's
17 c-o-m-i-t-y. I know some folks want to say
18 c-o-m-e-d-y.

19 MR. THOMAS: I guess the most telling is
20 the order of the British Court required the return of
21 all copies of the tapes. So the tape is here
22 illegally.

23 JUDGE RECHT: That's pretty compelling
24 stuff. I'm not ignoring that. I appreciate that.

25 Is there anything else other than

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1 comity?

2 MR. THOMAS: Well, authenticity and the
3 classic hearsay.

4 JUDGE RECHT: Okay. But the hearsay
5 ties into the ruling of the courts in the United
6 Kingdom on the basis of no trustworthiness.

7 MR. THOMAS: That's correct.

8 JUDGE RECHT: If we were going to do it
9 on the catch-all hearsay.

10 MR. THOMAS: For the convenience of the
11 Court, this was argued before, and the order of the
12 British court was attached to the memorandum. I can
13 certainly get that for you.

14 JUDGE RECHT: I recall it sometime back
15 and we just let it fade.

16 MR. BAKER: First of all, I might have
17 misheard Your Honor, but I thought you might have said
18 this document was fraudulently obtained.

19 JUDGE RECHT: I didn't. I thought
20 that --

21 MR. BAKER: This document was
22 produced --

23 JUDGE RECHT: Not you. At the time --
24 at the time that the British courts held, I presume.
25 Isn't that what you are saying, Mr. Thomas?

1749

1 MR. THOMAS: That's right, Your Honor.

2 JUDGE RECHT: That somehow it was
3 tainted.

4 MR. BAKER: Right.

5 JUDGE RECHT: No, but not that you

6 obtained it fraudulently.

7 MR. BAKER: I misunderstood.

8 JUDGE RECHT: Everybody is getting a
9 little paranoid in this case.

10 MR. BAKER: A couple things, Your
11 Honor. I think there might be some confusion between
12 the film Death in the West and these interviews. And
13 Death in the West is a compilation of a series of
14 interviews with various tobacco industry employees and
15 it was made into a movie, and that was the film that
16 they had such difficulty with.

17 This here we have the entire transcript,
18 and I think if Your Honor can simply look at the
19 portions we want to read --

20 JUDGE RECHT: Was this transcript, was
21 this part of what the courts in the United Kingdom
22 ruled upon?

23 MR. BAKER: That I don't know, Your
24 Honor.

25 JUDGE RECHT: What is it they ruled on?
1750

1 MR. BAKER: I don't know if they
2 specifically ruled on the transcript.

3 JUDGE RECHT: Is this transcript, do you
4 have a voice-over in the film on this transcript? Is
5 this the copy in the film?

6 MR. BAKER: Portions of the Death in the
7 West film I believe excerpt from this transcript. I
8 can be mistaken, but that's my understanding.

9 MR. THOMAS: You see, Your Honor, that
10 demonstrates the problem we have. We don't even know
11 exactly what we have. And that's why it's not
12 appropriate to come in unless we have some better
13 foundation of what it is, what it means and why the
14 British courts ruled as it did. We just don't know
15 what we have, Your Honor.

16 I do have the orders of the British
17 court, if you would like to see them?

18 JUDGE RECHT: May I see them?

19 MR. BAKER: Do you have an extra copy?

20 MR. THOMAS: I'm sorry, I don't have
21 copies for you. But they were attached to the motion
22 that was filed back in October.

23 JUDGE RECHT: Have you not seen these?

24 MR. BAKER: After Your Honor reads them.

25 JUDGE RECHT: Let me take a gander.

1751

1 Here is an extra copy. Give that to
2 Mr. Baker. Well, here, this is the front page. You
3 can get started. That's an extra copy.

4 I think you better look at it to the
5 extent to whether or not the order would embrace not
6 only the video but any written materials relating to
7 the video, and it seems to me that it may be that
8 broad.

9 MR. SEGAL: I believe it does.

10 MR. BAKER: I believe it does cover the
11 transcript as well, Your Honor.

12 JUDGE RECHT: Now, it gets down to a
13 basic question as to -- and considering whether or not
14 the principles of comity would apply. I mean, you
15 have some principles of estoppel, and then when you
16 talk about principles of estoppel, particularly

17 collateral estoppel, you are talking about as to
18 whether or not comity should apply, you have to then
19 examine and go behind the order to see -- I think
20 there is more of a reason -- and not to ignore what
21 they have done in the United Kingdom, but there is
22 more of a basis under 403 to consider the question of
23 unfair prejudice on a balancing test with the
24 principles of comity being applied in that area.

25 If you have a court that has found that

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1 this was fraudulently obtained, aside from the fact
2 that it loses much of its trustworthiness that may
3 satisfy any hearsay, I think the fact that you still
4 have the question of whether or not it is even hearsay
5 as to whether or not these people were Philip Morris
6 agents or something, but it's the fraudulent aspect of
7 it that bothers me.

8 Let me hear you on that. I mean, it is
9 pretty strong stuff if you have -- I don't know what
10 the high court of justice, Queen's Bench Division, I
11 have no idea where that -- what that court is in the
12 scheme of things in the judicial system of the United
13 Kingdom. But they have got a fancy seal on it, so it
14 must mean something. I mean, this isn't just a
15 magistrate court or something, not that there is
16 anything wrong with that.

17 MR. BAKER: I think, Your Honor, the
18 clearest way to look at it is simply to look at what
19 we are designating and that might give you a feel
20 for --

21 JUDGE RECHT: You are not asking for
22 much to be designated.

23 MR. BAKER: Actually I can't quite
24 understand why they would be objecting to it if they
25 look at what we are interested in.

1753

1 MR. THOMAS: Your Honor, this is a
2 pretty fundamental issue, and I think the content of
3 the document, we shouldn't go there until we resolve
4 the other.

5 JUDGE RECHT: No, I think, though, it is
6 important to look at what it is that they are trying
7 to get in and as to whether or not they could get the
8 same thing in another way.

9 MR. THOMAS: That's very true.

10 JUDGE RECHT: And I mean, even
11 conceivably the Frank Statement, I mean, there are
12 many other statements that may do the same thing
13 without -- I mean, for example, the one statement that
14 you want is an expression of some responsibility to
15 society because we are a publicly-held company.

16 Is this the only document that you have
17 that expresses that thought?

18 MR. BAKER: It is not, Your Honor, but
19 it expresses it very clearly.

20 JUDGE RECHT: Well, I appreciate that,
21 but you are still balancing.

22 I mean, and one of the things that we
23 would consider is whether or not can you achieve the
24 same thing or substantially the same thing in a manner
25 or using a document that was not already held to be

1754

1 fraudulently obtained? That really is where we are.

2 And -- hold on.

3 It appears what you are trying to do is
4 suggest there is a recognition of some moral
5 responsibility. Now, I don't know all of your
6 documents. I really don't. I know that in opening
7 statements there was -- there were some indication --
8 was this what you were referring to?

9 MR. BAKER: This was one of the
10 documents used in the opening statement, yes, Your
11 Honor.

12 MR. SEGAL: One quote from one
13 interview.

14 JUDGE RECHT: All right. But are there
15 any other ways to achieve virtually or substantially
16 the same thing?

17 MR. BAKER: Your Honor, we will withdraw
18 this exhibit.

19 JUDGE RECHT: I think that would be the
20 safest thing to do.

21 MR. THOMAS: Thank you, Your Honor.

22 MR. FARRELL: Your Honor, I have an
23 issue that I would like to take up.

24 On behalf of Lorillard, there are two
25 exhibits that are being proffered that have the same

1755

1 defect from our point of view that I think we need
2 some guidance from you.

3 In the first group, the 752040008.

4 MR. BAKER: Actually that's the very
5 first one.

6 MR. FARRELL: The very first exhibit on
7 the very first page. Mr. Baker advised he intends to
8 put that in Group 4, and also 75204014.

9 These documents, respectfully, are the
10 1953 annual report for my client Lorillard and the
11 1959 report. With respect to the substance of what
12 they want to publish, I have no problem. But in the
13 manner in which I understand Your Honor is going to
14 handle this, we have in each of these documents
15 consolidated financial returns, yearly earnings
16 reports, ten-year summary earnings reports that are
17 incorporated within the document that we believe would
18 be prejudicial. Even though not published, if the
19 entire document is going to go to the jury, we would
20 object.

21 JUDGE RECHT: First off, do you want the
22 entire --

23 MR. BAKER: The thinner, the better,
24 Your Honor.

25 JUDGE RECHT: You are not going to say

1756

1 in the rule of completeness it all should --

2 MR. FARRELL: Right. We are seeking
3 clarification to the extent they designate and we
4 counter-designate and we come back and conform, we are
5 going to have that which was published and nothing
6 else.

7 JUDGE RECHT: If you do that by
8 agreement, that's fine. Would you want to keep out
9 some of the financial information specifically in
10 here? Is that your problem?

11 MR. FARRELL: That's my problem on these
12 two, Your Honor.

13 JUDGE RECHT: That's what I mean. Some
14 time at some point that's going to come in in some
15 fashion. We are not going to be able to keep it out.
16 If that's not necessary, for example, we already let
17 in some areas in kind of a general sense, certain
18 financial information, but this is company-specific
19 and this would be something that would be more aligned
20 to a second phase TXO or Garnes.

21 MR. FARRELL: Precisely, Your Honor.

22 That's our point.

23 MR. BAKER: We would be happy to drop
24 everything after the year in review.

25 JUDGE RECHT: Just go get it, sit down

1757

1 and work it out.

2 MR. BAKER: Yes Your Honor.

3 MR. FARRELL: Second issue, Your Honor,
4 Document No. 7276 which is in the Group 4. Mr. Baker,
5 if you could help the Judge with the page number. I'm
6 not privileged to have that document.

7 MR. BAKER: I think you are working way
8 ahead of us.

9 JUDGE RECHT: What number?

10 MR. FARRELL: 7276. It was in the
11 Group 4 designation that Mr. Miller gave me.

12 MR. BAKER: It's on page twelve, it's
13 the second one down.

14 JUDGE RECHT: All right. Do we have
15 that, Marty?

16 MR. FARRELL: If I could have Your Honor
17 look at page two of that document and read first the
18 paragraph just above that which is highlighted to give
19 it context?

20 JUDGE RECHT: I don't have the
21 highlighted portion.

22 MR. BAKER: Just a moment and I will
23 have a copy.

24 JUDGE RECHT: You are talking about page
25 two?

1758

1 MR. FARRELL: Second paragraph.

2 JUDGE RECHT: Second paragraph?

3 MR. FARRELL: Yes, sir.

4 JUDGE RECHT: Starting the third

5 experiment.

6 MR. FARRELL: Yes, sir.

7 JUDGE RECHT: That entire paragraph,
8 that's what you are talking about?

9 MR. FARRELL: For context. He's not
10 seeking to put that in, but that is a modifier in the
11 predicate for the next paragraph which he does seek to
12 read and publish.

13 MR. BAKER: Here is a highlighted copy.

14 MR. FARRELL: The reason I bring this to
15 the Court's attention, I think it will help all of us,
16 this is one of the instances where in the highlighted
17 material we have the word nicotine used, fifth line
18 down, and I will read it in context: When the animals
19 were exposed to cigarettes delivering the same amount
20 of tar and nicotine, both with and without charcoal
21 filters respectively, the animals breathing the smoke
22 from the charcoal filtered cigarettes suffered greater
23 pulmonary damage and death rates than those breathing

24 smoke from the cigarettes containing cellulose acetate
25 filters.

1759

1 There are any number of occasions as I
2 look through what's being proposed here where the word
3 nicotine appears in this context coupled by the
4 conjunctive and with the word tar. And I think both
5 from -- obviously we are striving terribly to keep
6 nicotine out, I want to make sure that I understand
7 that before this gets published to the jury, that's
8 going to be redacted.

9 JUDGE RECHT: Well, is it?

10 MR. BAKER: It most certainly will be
11 redacted, Your Honor.

12 MR. FARRELL: Then to the extent we
13 counter-designate where similar conjunctives are in
14 line, then it's our obligation to also take care of
15 that in terms of the redacting.

16 JUDGE RECHT: That would be my
17 understanding. Is that right, Mr. Baker?

18 MR. BAKER: That would be fine.

19 MR. FARRELL: The question then becomes,
20 Mr. Baker, if I could speak to you because it's a
21 technical question, you have got it on the screen. I
22 want to go a paragraph above, such as this, to put it
23 in context, what do we have to say to your people in
24 terms of them redacting it if you are going to show it
25 through your machine as opposed to your ELMO?

1760

1 MR. SEGAL: If you give us what you
2 want -- if they will give us what they want one day
3 before -- preferably two days, but in a tight spot,
4 Your Honor, we could do it in a day. But if two days
5 before we had what they wanted, it will be loaded into
6 the machine so that contemporaneous with the
7 presentation, they can have exactly what they have
8 redacted loaded in the machine and done.

9 JUDGE RECHT: And if it's not done that
10 way, it's not going to be used until it is done.

11 MR. FARRELL: All right. By either
12 side?

13 JUDGE RECHT: By either side.

14 MR. FARRELL: Right. That's what I'm
15 looking for is the rule of fairness.

16 JUDGE RECHT: I can't imagine a better
17 incentive to make sure it's done that way.

18 MR. FARRELL: That's fine, Your Honor.
19 That's all I have today. Thank you,
20 sir.

21 JUDGE RECHT: Anything else?

22 MR. SEGAL: Yes, but on documents, no.
23 I have a question.

24 JUDGE RECHT: Nothing else on documents,
25 Marty?

1761

1 Mr. Segal?

2 MR. SEGAL: Is the courtroom secure at
3 night for things like rule books?

4 JUDGE RECHT: Yes.

5 MR. SEGAL: Second question is, Your
6 Honor, most courts that I have appeared before -- but
7 since we are just starting out, I want to get it right
8 for everybody -- when they begin their cross-

9 examination, you may never speak to the witness again,
10 and obviously we are going to have a lot of overnight
11 witnesses, but believe it or not some judges say, no,
12 the minute they take the oath you may never speak to
13 them again. You can speak to them about the weather
14 and dinner, but not about the case. I didn't know
15 what your rule was.

16 JUDGE RECHT: My rule has been and
17 always will be once they take the oath, once they are
18 on the witness stand, they are not to -- except in a
19 criminal case, the Constitution says you can't do
20 that.

21 But that's how we do it. It's just that
22 way it eliminates any problem at all. So in other
23 words, right now Doctor Henningfield, if you wanted --
24 you can talk to him certainly; just don't discuss his
25 testimony.

1762

1 MR. SEGAL: I understand. And the only
2 other question I have is when the Court gives
3 admonishments, are we allowed to repeat those with the
4 witness prior to cross, purely to -- and promising not
5 to discuss the testimony, but to ensure that the
6 witness is reminded of the Court's admonishments?

7 JUDGE RECHT: I should have, and so many
8 things were going on, I normally tell the witness that
9 before they leave the witness stand.

10 Has he gone?

11 MR. SEGAL: He's left the building.

12 JUDGE RECHT: You can tell him we
13 discussed him and he's not to -- it makes it easier
14 for him and makes it easier for you to talk about
15 everything other than this case.

16 Anything else?

17 MR. SEGAL: What about the Court's
18 admonishments, do or don't?

19 JUDGE RECHT: Yes.

20 MR. SEGAL: Okay.

21 JUDGE RECHT: Yeah, sure.

22 MR. SEGAL: I wanted everybody to play
23 by the same rules.

24 JUDGE RECHT: It is, but the burden is
25 on me to do it. I should have told him that, and that

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1 would have made things a lot easier. It would have
2 obviated that question.

3 Anything else?

4 MR. SEGAL: Yes. I would like to know
5 if your law clerk and Mr. Baker are calling each other
6 in the morning about what to wear to court?

7 JUDGE RECHT: That's the uniform.

8 That's the uniform. That's it.

9 All right thank you all very much. See
10 you tomorrow morning at 8:00.

11 (Whereupon, the proceedings adjourn at
12 5:35 p.m.)

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